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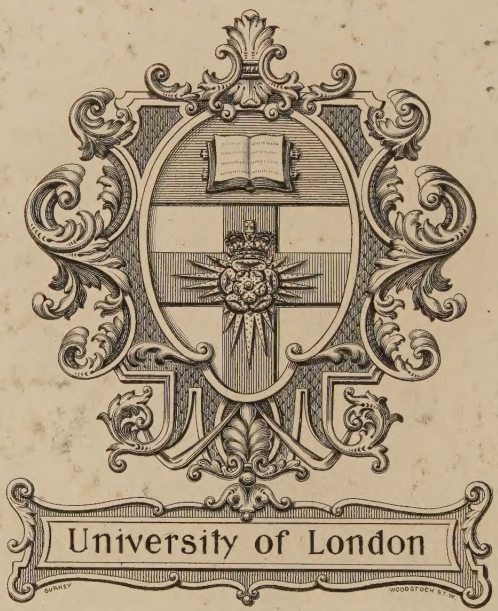

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1904. *March* 6. The Right Honourable Lord Shand, *a Member of the Judicial Committee under s.* 3 *of the Appellate Jurisdiction Act,* 1887, *died after a short illness at the age of* 76.

April 4. The Honourable Sir Edmund Widdrington Byrne, *one of the Justices of the High Court of Justice, died after a short illness at the age of* 59.

April 25. Thomas Rolls Warrington, *one of His Majesty's Counsel, was appointed one of the Justices of the High Court of Justice, and was afterwards knighted.*

In the month of June, The Honourable Gainsford Bruce, *one of the Justices of the High Court of Justice, resigned his office on account of ill-health.*

June 13. Reginald More Bray, *one of His Majesty's Counsel, was appointed one of the Justices of the High Court of Justice, and was afterwards knighted.*

Aug. 13. The Honourable Sir Robert Samuel Wright, *one of the Justices of the High Court of Justice, died after a long illness at the age of* 65. *He had some time previously tendered his resignation of the office held by him.*

Sept. 9. Alfred Tristram Lawrence, *one of His Majesty's Counsel, was appointed a Justice of the High Court of Justice, and was afterwards knighted.*

Dec. 6. The Right Honourable Lord Hobhouse, *formerly a Member of the Judicial Committee of the Privy Council, died at the age of* 85.

ERRATA.

Page	*Line*	*For*	*Read*
115	7, 8, 9	delete the sentence "He pleaded . . . . hard labour."	
287	last line	Kekewich	Kenrick.
294	foot-note (1)	10 H. L. C. 124	7 H. L. C. 124.
342	head-note, line 5, and line 14 of statement of facts	bought	subscribed for.
623	8 from foot	σκευέσι	σκεύεσι.

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

HENRY HARRISON . . . . . APPELLANT;

AND

GEORGE E. KIRK . . . . . RESPONDENT.

H. L. (I.)
1903
Nov. 10.

Practice—Administration—Secured Creditor, Proof by against the Real Estate—Lapse of Time—Application to prove against Personalty—Fund in Court.

Where in an administration suit there is a fund in court, a creditor for a debt at law, though the appointed time for coming in has long elapsed, is by well-established practice allowed to prove against the general estate, subject to terms as to costs and as to payments already made.

The decision of the Irish Court of Appeal reported as *Beattie* v. *Cordner*, [1903] 1 I. R. 1, affirmed.

BY a deed in 1877 Richard Davison Harrison mortgaged part of his real estate in Ireland for 8000*l.* to one Wallace, with a covenant to pay the loan and interest. In January, 1888, he died, having by will made the appellant his residuary

H. L. (I.) 1903 HARRISON v. KIRK.

legatee and devisee. In April an action was brought by Beattie, a creditor, for the administration of the testator's estate. In July the primary decree was made in the usual terms for accounts and inquiries: the personal estate to be applied in payment of the debts and funeral expenses, and if the personal estate was insufficient, for an inquiry as to the real estate and the incumbrances, &c. In November advertisements were issued in newspapers requiring all creditors to send in their claims on or before December 4, 1888; in default whereof they would be peremptorily excluded from the benefit of the decree. The mortgagee, Wallace, made no claim against the personal estate, but in February, 1889, made an affidavit in the administration suit verifying his claim to the mortgage debt and interest charged upon part of the real estate. At that time the lands mortgaged were believed to be a sufficient security for the claims upon it.

In June, 1902, the respondent Kirk, in whom the mortgage was now vested, moved for leave to claim for a debt of 7000*l.* and interest against the personal estate. The appellant made an affidavit stating reasons why the application should be refused and alleging (inter alia) that the real estate ought to have been sold long ago in the proceedings in the Land Court, when it would have realized much more than it would now since the rents had been reduced; that the administration had been misconducted; and that he had made great sacrifices of time and income in putting the estate in better condition and discharging the obligations to the creditors. Sir Andrew Porter M.R. refused the motion on the ground that by reason of the laches of the mortgagee he must be taken to have abandoned his claim against the general estate. This decision was reversed by the Irish Court of Appeal (Lord Ashbourne L.C., and FitzGibbon and Holmes L.JJ.), who made an order that the respondent be at liberty to prove on the terms (which the respondent's counsel had offered) that any sum proved should be payable out of the residue of the real and personal estate after payment of the debts and costs already proved or admitted. (1) The appellant brought the present appeal.

(1) [1903] 1 I. R. 1.

Nov. 9, 10. *The Appellant in person.* A creditor in an administration suit who has a claim at law and has failed to come in to prove at the proper time may be finally excluded by the Court of Chancery where the assets have been appropriated to creditors and legatees, and even where there is a fund in court. The cases of *Montefiore* v. *Browne* (1), *In re Metcalfe* (2), *Penfield* v. *McMurdo* (3), and the cases there discussed recognise that conduct such as is proved in the present case justifies the Court in excluding the claimant. The practice of the Court is accurately summarized in the Irish Rules of 1891, Order LV., rr. 46, 57, which respectively correspond to and are substantially identical with Order LV., rr. 44, 57, of the English rules. The rules in terms peremptorily exclude unless the claimant comes in on or before a fixed day. Negligence, default, unreasonable delay, are ground for excluding and exist here. The right to come in was unexpended in *Penfield* v. *McMurdo* (3); here it is not so. The mortgagee must be taken to have elected to forego his remedy against the personal estate. Having abandoned it, he cannot now claim it. The fund in court having been appropriated by the final decree must be treated as having been paid; and the Court will not assist a defaulting claimant to make the creditors and legatees refund it: see 1 Daniell's Chancery Practice, c. xvi., s. 3 (8), 7th ed. pp. 829–30, and the cases there cited.

Haldane, K.C., Ronan, K.C. (Irish Bar), and *Whitaker* (Irish Bar), for the respondent, were not heard.

EARL OF HALSBURY L.C. My Lords, whatever sympathy we may feel, and most of us will have felt, to be properly applicable to the appellant, I am afraid it is impossible, without reversing the principles on which the administration of the Court of Chancery has ever been exercised, to suggest any doubt as to the proper decision of this case. Here there is no doubt about the existence of the debt or of a fund in court; and I have inquired with some interest what authority there is for saying that the Court of Chancery or any other Court,

(1) (1858) 7 H. L. C. 241. (2) (1879) 13 Ch. D. 236.
(3) [1902] 2 Ch. 684.

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under those circumstances, can refuse to recognise the right of a person who is entitled to have his debt paid out of a particular estate. It is a totally different question where the money has been distributed to legatees or to claimants, and the question is about following the money and endeavouring to get back that which has been already distributed. That case may raise questions of considerable difficulty.

But no such question arises here. The money is still there to be distributed to the persons who are entitled to have it, and the respondent here is a person who has established his right to that money. I seek in vain for any principle that would justify the Court in saying that he is not to have it because when originally the distribution of the assets was being settled he thought his security was enough. It turns out that it is not enough. The answer made to his claim to have his debt paid is, "Oh, you made a mistake when you originally thought the security was enough, because now it is not enough; and therefore, because you abstained from claiming against the general assets, you are not to have your debt paid at all." It seems to me that that would be a most monstrous conclusion for any Court to arrive at, and I am happy to see, after a review of all the authorities on the subject, that from a very early period any such proposition receives no countenance whatever from the practice of the Court of Chancery; the practice seems to have been absolutely the other way.

I therefore move your Lordships that this appeal be dismissed with costs.

LORD SHAND. My Lords, I am of the same opinion. No question here arises with other creditors of the deceased testator. It is admitted that the right of those creditors to the payment of their debts is not interfered with, and will receive effect notwithstanding the claim now made.

In a question, then, arising with the residuary legatee and devisee only, it seems to be clear that the respondent, the mortgagee, has done nothing expressly or by implication to preclude him from claiming the right to payment in full of the debt due to him from the testator's personal estate. He

has merely delayed making his claim for reasons which he explains, and which seem to be quite reasonable in themselves. He has not done anything restricting his full right as a creditor. That being so, and as there is a present fund in court, part of the testator's estate, and so liable for his debts, I think the decision of the Court of Appeal, which is supported by a body of authority extending over a long period of time, is right, and should be affirmed.

LORD DAVEY. My Lords, the learned Master of the Rolls in the present case said that he considered that he was not coerced to grant the application of the mortgagee to obtain the benefit of the administration suit, and that, not being coerced, he should decline to grant it. The view expressed in that language seems to me to rest upon a misapprehension of the character of an administration suit and of the jurisdiction of the Court of Chancery in administering assets in an administration suit.

When the Court of Chancery had taken into its own hands the administration of an estate, it restrained creditors from pursuing their legal remedy against the executors. The Court made a decree for the administration of the estate which operated as a judgment for all the creditors, and, as it precluded the creditors from asserting their legal remedies, it provided other means for them to obtain payment of their debts. The Court was bound to see that the creditors whom it restrained from pursuing their legal remedies were not deprived of the means of having the assets of the testator applied to the payment of their debts. It is an entire fallacy, but I think a very common one, to suppose that because the debt had to be proved, or the payment of the debt had to be enforced through the medium of the Court of Chancery, it became an equitable demand and ceased to be a legal demand. Its character was not altered one whit: it remained a legal demand, and the right of the creditor who came in to prove under an administration decree remained a legal right and the debt which was recoverable was a legal debt: the only difference made was in the remedy by which the debt could be recovered.

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That being so, the Court of Chancery usually fixed a time within which the creditors could come in and prove their debts; and obvious convenience rendered that necessary, because otherwise the administration would have been hung up for ever. No doubt, as has been pointed out, the language in which the time was fixed was somewhat peremptory; it told people that they would be excluded from the benefit of the decree if they did not come in within the time. But it has long been settled that the language so used was in terrorem only, and that the effect of it was merely this, and nothing more: that any creditor who did not come in and prove his debt before the day fixed ran the risk of some of the assets being administered and disposed of by the Court in payment of other creditors; and in that way the fund for the payment of his debt might be imperilled, or if the estate was insolvent he might lose a portion of the dividends which he would otherwise have received.

That that is so I think is plain from the language used by Lord Eldon in *Gillespie* v. *Alexander* (1): "Although the language of the decree, where an account of debts is directed, is that those who do not come in shall be excluded from the benefit of that decree, yet the course is to permit a creditor, he paying the costs of the proceedings, to prove his debt as long as there happens to be a residuary fund in court or in the hands of the executor and to pay him out of that residue." So far as my experience of the Court of Chancery while it existed, and of the practice of the Chancery Division since the Judicature Act, goes, that rule has been invariably acted upon, and I do not hesitate to adopt the expression which is said to have been used by one of the learned judges that it is the ordinary rule.

Of course in admitting creditors to come in at any time to take the benefit of the decree the Court is entitled to and does impose certain terms—terms indeed not affecting the legal right of the creditor, but affecting the mode in which he shall pursue his remedy. For instance, they require a creditor to pay the costs of the application which has been occasioned

(1) (1827) 3 Russ. 130, 136; 27 R. R. 35.

through his delay in coming in; and other conditions may be imposed upon the persons coming in at a late hour according to the circumstances of the case.

And here a distinction must be drawn. In the very able argument of the appellant at your Lordships' bar he did not always bear in mind the distinction between the case where there is still remaining in court a residue or a fund legally applicable to the payment of debts, and the case where the whole of the estate has been distributed, and it is necessary in order to obtain payment for the creditor to get back from legatees or others who have been paid, the money which has been paid to them. In the first case the creditor is exercising merely a legal right. In the other he is exercising an equitable right which is given him by the equitable doctrines of the Court of Chancery, because he has no legal right against the legatees; he has no legal right against the residuary legatee; his only legal right is against the executor. But the Court of Chancery, in order to do justice and to avoid the evil of allowing one man to retain what is really and legally applicable to the payment of another man, devised a remedy by which, where the estate had been distributed either out of court or in court without regard to the rights of a creditor, it has allowed the creditor to recover back what has been paid to the beneficiaries or the next of kin who derive title from the deceased testator or intestate. In that case, no doubt, equitable defences may be made to the claim.

If authority were wanting, I think this distinction is carefully pointed out in *Ridgway* v. *Newstead* (1) by Stuart V.-C. In that case there was a fund in court, but it was insufficient for the payment of the creditors who desired to prove, and there were also sums standing to the credit of infant legatees. Stuart V.-C. admitted at once, without question, the right of the creditor to come in and take the benefit of the decree and prove as regards the residuary estate which still remained undistributed; but as regards the right which he claimed to obtain payment out of sums which had been carried to the credit and appropriated for the payment of the legacies of certain infant

(1) (1860) 2 Giff. 492, 501; affirmed on appeal, 3 D. F. & J. 474.

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legatees, he disallowed the claim on the ground that there was an equitable defence of laches or acquiescence or conduct of that kind. What he says is this: "I think the plaintiffs have established their right against the general assets of the testator standing in court to the credit of the cause of *Fox* v. *Newstead*. But as to the claim against the other legatees who have been in part paid and towards whose legacy an appropriation has been made out of the fund paid into court by the executors under the Trustees Relief Act, I feel the greatest doubt and difficulty." Then he discusses that point, and ultimately decides against the creditor. In doing so he says: "I have always understood that the right of a creditor to make legatees refund may be affected by the course of conduct of that creditor—that he may pursue such a course, by laches, acquiescence or otherwise, as to make it highly inequitable for the Court to allow him to assert any right against the legatees."

I will not trouble your Lordships by reading further authorities, because I think that judgment of Stuart V.-C. puts the difference between the two cases in a most marked manner. It would be to my mind almost an absurdity if the Court of Chancery, which, in order to prevent money being paid to one person which properly belongs to another, has devised a form of action by which money may be recovered back from the legatee, should refuse to allow the creditor in the present case the benefit of the suit, when there is a fund in court applicable to his payment, and put him to the expense and trouble of pursuing his remedies against the residuary legatee and the other legatees. That is an absurdity which I think cannot be credited to either the Chancery Division or any Division of the Courts in Ireland or in this country.

Therefore, as the result of the principles upon which the Courts of Chancery acted in administration suits, and which are still binding upon the Chancery Division of the High Court, and also as the result of the authorities which have been referred to, my opinion is that where there are general assets in court applicable to the payment of a creditor's debt, no authority has been or can be quoted in which the Court has

refused to allow a legal creditor to come in and share in those assets which still remain, subject of course to conditions and terms such as those which I have already referred to. The only way in which a creditor, with a legal right of action, making that application can be met, is by shewing that he has in some way either released or abandoned his claim against the personal property or general estate of the testator.

The appellant was disposed, I think, to put his case as high as that; but I do not think it necessary to do more than to express my entire concurrence in what has been said by my noble and learned friend on the Woolsack, that there is not a shadow of proof that the creditor has done anything whatever which is evidence of a release, abandonment, or waiver of his claim against the general estate of the mortgagor. What he has done is this. Sharing the opinion which, as the appellant ingenuously told us, was his own opinion and the opinion of his advisers, that the mortgaged estate would prove sufficient for the discharge of the claims upon it, he did not think it necessary—perhaps it would have been thought harsh if he had done it under the circumstances; at any rate he did not think it necessary—to prove against the general estate of the testator; and he allowed, at his own peril, the general estate of the testator to be partially administered up to the point of the second further consideration. But afterwards, finding from the proceedings in the Land Court that he was not likely to be paid in full out of the proceeds of the mortgaged estate, he then determined to make his claim against the general estate.

I can see nothing which amounts to a release or abandonment of his claim; and that being so, I am of opinion that the Court of Appeal was right in admitting the claim, and that the terms which they imposed as the condition of admitting the claim are at least not too favourable to the claimant.

Mr. Harrison in his argument rather wished us to take into account what he thought had been the misconduct of the gentleman who was formerly a trustee of the real owner of the mortgage, not in his character of mortgagee, but in his character of solicitor for some of the parties having adverse

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rights; but I need scarcely say that any consideration of that kind would be totally irrelevant. The Court has considered those questions and they are not before your Lordships, and any consideration of that kind is perfectly irrelevant so far as it affects the right of the real owner of the mortgage, the present respondent.

I am, therefore, of opinion that the appeal should be dismissed.

LORD ROBERTSON. My Lords, I own to a strong antecedent reluctance to accept the conclusion that, in the distribution of extant assets of a deceased person, a residuary legatee is to be preferred to an unpaid creditor. I was prepared, however, to adopt a more sophisticated opinion had it been shewn that by some clearly established system of practice the Irish Courts had become disabled from rendering this very elementary justice. But an examination of the authorities and the weighty opinion of Lord Davey convince me that the judgment appealed from is right according to Chancery practice as well as on a more elementary comparison of the rights of parties.

When all is said about the conduct of this creditor, it comes to no more than that the residuary legatee is naturally disappointed that the creditor finds it necessary to enforce the personal obligation in order to get payment of his debt.

I am glad to find that there is no authority for holding that the institution of an administration suit reduces the right of a creditor in a mortgage to a more or less precarious appeal for a share in residue dependent on good conduct.

My view of the case is exactly expressed by Holmes L.J. in the last paragraph of his judgment: "It would appear to me," his Lordship says, "that, subject to the rights of the other creditors, it would be a matter of course to allow the applicant to prove as against the residuary legatee, because the latter can get nothing until the debts are paid. Our order will not affect any of the creditors who have already proved, or any costs that have been already incurred: it will only affect the interest of the residuary legatee, and the simple question seems to me to be whether the testator's estate is to pay his

debts? Apart altogether from any cases that have been quoted, I think that no Court which administers equity or justice would prevent a creditor under such circumstances coming in to prove." (1)

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 10, 1903.

Solicitors: *Denton, Hall & Burgin, for V. B. Dillon & Co., Dublin; Arber & Lewis, for Gerard A. Howe, Dublin.*

[HOUSE OF LORDS.]

MOREL BROTHERS & CO., LIMITED APPELLANTS;

AND

EARL OF WESTMORLAND . . . . RESPONDENT.

Husband and Wife—Authority of Wife to pledge Husband's Credit—Goods supplied on Order of Wife—Joint Liability—Presumption arising from Cohabitation—Principal and Agent—Alternative Liability—Election—Judgment signed against one of two Defendants—Order XIV., r. 5.

The fact that husband and wife live together and that necessaries for the household are supplied on the orders of the wife is not evidence that husband and wife are jointly liable. The presumption that the wife has in such a case authority to pledge the husband's credit may be rebutted by proof that he made her a sufficient allowance, though this arrangement is not known to those who supply the necessaries.

Order XIV., r. 5, does not apply where the right of action can only be in the alternative against one or other of two defendants. In such a case judgment against one of the defendants is conclusive evidence of an election not to proceed against the other.

The decision of the Court of Appeal, [1903] 1 K. B. 64, affirmed.

THE appellants brought an action against the Earl and Countess of Westmorland for the price of wines and provisions supplied, and signed judgment under Order XIV. against

(1) [1903] 1 I. R. 1, at p. 16.

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the Countess, who did not defend. The judgment being fruitless they proceeded against the Earl. At the trial before Phillimore J. with a jury it appeared that when these goods were supplied Lord and Lady Westmorland were living together at Apethorpe Hall, Northamptonshire, except when he was with his regiment in South Africa or elsewhere. Part of the goods were supplied before July, 1899, and part after. In that month an arrangement was made between Lord and Lady Westmorland by which he set aside 2000*l.* a year (out of his total income of 2500*l.*) for the household expenses to be paid into a separate banking account upon which he or she might draw: the Countess to have her own income of 400*l.* a year for her exclusive use. The plaintiffs had no notice of this arrangement. The Earl paid the 2000*l.* a year. The questions put by Phillimore J. to the jury and their answers were as follows: (1.) Was the Earl liable for goods supplied prior to July, 1899?—Yes. (2.) As to goods supplied since that date, (*a*) Were they necessaries for the station of the defendant?—Yes. (*b*) Did the Earl give his wife a sufficient allowance for household expenses?—On income named, Yes. (*c*) Did the Earl prohibit his wife from incurring any household expenditure except out of the agreed allowance?—Yes. (*d*) Did the Countess in ordering from the plaintiffs act as agent for the Earl jointly with herself or for the Earl only or for herself only?—For the Earl and herself jointly. (*e*) To whom did the plaintiffs give credit?—To the Earl in the name of the Countess.

Phillimore J. gave judgment against the Earl for the whole amount supplied both before and after July, 1899. The Court of Appeal (Collins M.R., Romer and Mathew L.JJ.) reversed this decision and entered judgment for the Earl, on the ground that as to the goods since July, 1899, any presumption as to the wife having an implied authority to pledge the husband's credit was rebutted by the evidence as to the arrangement; that as to the goods both before and since July, 1899, there was no evidence of a joint liability in the husband and wife; that having signed judgment against the wife the plaintiffs could not recover against the husband; and that

Order XIV., r. 5, does not apply where the right of action can only be in the alternative against one or other of two defendants. (1) The plaintiffs brought the present appeal.

Nov. 10, 12. *Shearman, K.C.*, and *Hills*, for the appellants. The case is very different from *Debenham* v. *Mellon*. (2) There the claim was for clothes supplied to the wife alone. Here it is for provisions for the joint use of the husband and wife who were living together. As to the goods supplied before July, 1899, the wife clearly had authority to pledge her husband's credit, and if she had that authority she had authority to pledge his credit for a liability jointly with her own liability. As to the goods supplied after July, 1899, the plaintiffs had no notice of the arrangement: the wife had authority to pledge her husband's credit up to 2000*l*., and it has been held frequently that where an agent has authority to act for his principal up to a certain amount the principal cannot repudiate his agent when the agent has exceeded the limit, if the existence of the limit is not known to the person with whom the agent contracts. That will not be disputed. The Court of Appeal decided that judgment against the wife was an election not to sue the husband. But it is clear the plaintiffs did not elect to release or abandon the claim against the husband, for at the same time that they signed judgment against the wife they proceeded against the husband. It is not as in *Kendall* v. *Hamilton* (3), where there were two actions. *Scarf* v. *Jardine* (4), on which the Court of Appeal acted, was not a case of husband and wife but of partnership, and the cases are not parallel. There is nothing in Order XIV., r. 5, expressing or implying that it is confined to cases of joint liability. In terms it gives leave to a plaintiff to enter final judgment against one defendant and to issue execution upon that judgment without prejudice to the right to proceed with the action against the other defendant. The construction of the Court of Appeal imports words into the rule which are not there. But if the plaintiffs made a mistake in signing

(1) [1903] 1 K. B. 64.
(2) (1880) 6 App. Cas. 24.
(3) (1879) 4 App. Cas. 504.
(4) (1882) 7 App. Cas. 345.

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judgment against the wife it is only a technical one, and justice should be done by allowing the plaintiffs to strike out the judgment against the wife and enter judgment against the husband, upon proper terms as to costs. And the appellants now make formal application to the House for leave to do this.

Gore-Browne, K.C., and *Bonner*, for the respondent, were not heard.

EARL OF HALSBURY L.C. My Lords, the plaintiffs might have sued either the agent or the principal. I prefer keeping to those terms because it gets rid of the confusion which arises from the peculiar relation of these parties to each other. The result was that the plaintiffs got judgment against the agent. They cannot get judgment against the principal also. It is an alternative remedy; it cannot be made available against the two.

My Lords, I think the authorities upon which the Master of the Rolls' judgment is founded, one of the principal authorities being a decision of this House, render it absolutely impossible to go back upon the course of decision upon this subject. I am myself satisfied that the question was rightly decided both in this House and in the Court of Appeal.

With reference to the rule upon which reliance has been placed (Order XIV., r. 5), I think it is accurately stated in the Yearly Practice of the Supreme Court, edited by Mr. Muir Mackenzie and Mr. Chitty and others, that "the rule does not apply to the case of alternative liability. Therefore, if the claim is against two defendants as alternatively liable, and judgment is signed against one, this rule does not enable the plaintiff to proceed against the other; and the doctrine of election established by *Scarf* v. *Jardine* (1) applies." I concur with that, and move your Lordships that this appeal be dismissed with costs.

LORD SHAND. My Lords, I concur.

LORD DAVEY. With regard to the part of the claim which is subsequent to July, 1899, it appears from the evidence of the

(1) 7 App. Cas. 345.

solicitor that an arrangement was made by which a sum was placed at the disposal of the Countess by the Earl out of his own money for the purpose of her continuing to manage the household and defray the household expenses. The learned Master of the Rolls in the Court below has discussed the effect of that arrangement, which I agree with him meant that the Countess was not to pledge the credit of the Earl, but to pay the expenses of the household out of the annual sum which was placed at her disposal in a separate banking account for that purpose. The Master of the Rolls has illustrated the conclusions to which he came by the authorities bearing upon the subject. I do not desire to add anything to what he has said; I simply express my concurrence with his view as to the effect of that arrangement with regard to that part of the claim of the appellants.

With regard to the earlier claim, for the period prior to July, 1899, I agree with what has been said by my noble and learned friend on the Woolsack. I am disposed to think that if the proof had established a joint liability the plaintiffs would not have been prejudiced by signing judgment under Order XIV. against one of the joint debtors. I think they might then go on and shew that the other debtor was also a joint debtor. But if the proof which they tendered at the trial shews, not a joint debt by the two, but an alternative claim against one or the other, then I think that by signing judgment against one they have, on the principle of *Scarf* v. *Jardine* (1), elected to take their remedy against that one, and cannot afterwards sue the other who is not jointly but alternatively liable. And I agree that the concluding words of Order XIV., r. 5, do not enable the plaintiffs to pursue their remedy against the other defendant who has got leave to defend, if the proof should shew that the claim against the two was not joint but alternative. I think therefore that the appeal must be dismissed.

LORD ROBERTSON. My Lords, it is enough to support this judgment that there was no evidence at all of joint liability.

The period before July, 1899, is bare of any evidence which

(1) 7 App. Cas. 345.

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would yield the legal inference of joint liability. The true theory of the case, namely, that the Earl was principal during the earlier period, is not available to the appellants now that they have taken judgment in this suit against the lady who ex hypothesi was agent.

The period after July, 1899, is made much clearer, in a positive sense, for I hold the arrangement made to have deprived the lady of all power to pledge her husband's credit. The Earl substituted this fund, which he placed at the lady's disposal, for any authority, express or implied, to pledge his credit at all, joint or several. This being the fact, the well-established law of *Debenham* v. *Mellon* (1) protects the respondent.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 12, 1903.

Solicitors: *A. L. Rayner; Royds & Rawstorne.*

(1) 6 App. Cas. 24.

[HOUSE OF LORDS.]

LAWRENCE & BULLEN, LIMITED . APPELLANTS; AND AFLALO AND COOK . . . . . RESPONDENTS.

H. L. (E.) 1903 Nov. 13.

Copyright—Encyclopædia—Article—Author and Publisher—Copyright in Contributions—Inference of Fact—Copyright Act, 1842 (*c.* 45), *ss.* 2, 3, 18.

Where the proprietor of an encyclopædia employs and pays another person to compose articles for publication in the encyclopædia, the question whether the copyright in the articles belongs to the proprietor within s. 18 of the Copyright Act, 1842, depends on an inference of fact—not law—to be drawn by a reasonable man from the nature of the contract and all the circumstances. The contract need not be in writing; no express words need be used; and the inference that the copyright was intended to belong to the proprietor may be fairly drawn where there are no special circumstances and the only material facts are the employment and the payment.

Sweet v. *Benning*, (1855) 16 C. B. 459, followed.

The decision of the Court of Appeal, [1903] 1 Ch. 318, reversed and the question what the words "separately published" mean in s. 2 left open.

IN 1896 the respondent Aflalo submitted to the appellants who are publishers a scheme for the compilation and publication of a work to be called "The Encyclopædia of Sport." It was agreed between them in writing that the appellants should publish and bear all the cost of publishing the work: that they should pay Mr. Aflalo a fee of 500*l.* for his editorial services: that he should write without further fee 7000 words of the special articles and contribute all the unsigned articles that might be required. At the appellants' request he engaged the respondent Cook (who under the pseudonym of John Bickerdyke was a well-known writer on angling) to contribute an article of 5000 words on Angling and separate articles of 5000 words each on Trout and Pike, at the rate of 2*l.* per 1000. Mr. Aflalo edited the work and contributed a signed article on Sea Fishing. Mr. Cook contributed his three articles and signed them as John Bickerdyke. Both were paid, and the

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work was published. In 1900 the appellants published a book called "The Young Sportsman," containing substantially copies of each of the articles contributed by the respondents.

The respondents were registered as proprietors of the copyrights of their respective articles, and the appellants as proprietors of the copyright of the encyclopædia.

The respondents having brought an action against the appellants for infringement Joyce J. granted an injunction. (1) This decision was affirmed by the Court of Appeal (Romer and Stirling L.JJ., Vaughan Williams L.J. dissenting). (2) Against these decisions the present appeal was brought.

Nov. 12, 13. *Haldane, K.C.*, and *Younger, K.C.* (*T. L. Gilmour* with them), for the appellants. By s. 2 of the Copyright Act, 1842, "Book" shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published. By s. 18, where the proprietor of an encyclopædia employs and pays persons to compose articles for publication therein on the terms that the copyright in the articles shall belong to the proprietor, the copyright in the encyclopædia and in every article so composed and paid for shall be the property of the proprietor, who shall enjoy the same rights as if he were the actual author thereof.

The respondents must, to maintain this action, establish two points and the onus lies on them: (1.) that the copyright in these articles did not pass to the publishers under s. 18 of the Copyright Act, 1842; (2.) that each article is a "book separately published" within s. 2. If they fail on either point they have no case. On the first point it is concluded by the authority of *Sweet* v. *Benning* (3) that on the construction of s. 18 the contract between the publisher and the author of the article need not be in writing; that no express words are necessary to constitute the bargain; that the inference to be drawn from the nature of the contract and all the circumstances is an inference of fact and not of law, and that the

(1) [1902] 1 Ch. 264. (2) [1903] 1 Ch. 318.
(3) 16 C. B. 459.

reasonable inference in such a case as *Sweet* v. *Benning* (1) was that the copyright was to belong to the publisher. The present case is similar; and the same inference must be drawn by reasonable men. This view was followed by the Court of Appeal in *Lamb* v. *Evans*. (2) The bargain is a sale out and out of the author's rights, not a mere licence to publish in the encyclopædia. Would any business man make such a bargain and pay for it, if the author had the right to publish his article elsewhere the next day?

On the second point the respondents must make out that "separately published" means "which may be separately published," or (as Romer J. seems to have thought in *Johnson* v. *George Newnes, Ld.* (3)) "published so that it can be separated." In an encyclopædia containing 3000 articles are there then 3000 "books separately published"?

Hughes, K.C., and *Scrutton, K.C.* (*R. J. Parker* with them), for the respondents. On the first point the onus lies on the publisher to shew that the copyright passed to him. Primâ facie the author of a literary work is entitled to the copyright: it is the product of his own brains and labour. The publisher must establish something which rebuts that presumption. Here there is nothing of the sort—nothing special in the nature of the contract or the circumstances. Sect. 18 is strangely drafted—almost unintelligible—but it is for the publisher to bring himself clearly within its terms. Authority is not all one way, as the appellants appear to suppose. In *Walter* v. *Lane* (4) it is assumed in the judgments that a report in a newspaper is a "book separately published," and that the reporter is the author of the report and has the copyright in it. *Sweet* v. *Benning* (1) was a case of head-notes of law reports: very different from the present. But if it is applicable it should be overruled.

The arguments on the second point, upon which their Lordships expressed no opinion, need not be repeated here. They are fully developed in the report below. (5)

(1) 16 C. B. 459.
(2) [1893] 1 Ch. 218, 233.
(3) [1894] 3 Ch. 663.
(4) [1900] A. C. 539.
(5) [1903] 1 Ch. 322–4.

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EARL OF HALSBURY L.C. My Lords, if I had not come to the conclusion that this case was covered by authority, I should have desired further time to consider the mode in which I should express the views I entertain.

I think it is impossible after the decision arrived at just about half a century ago in *Sweet* v. *Benning* (1) upon this very point, confirmed as it is by the decision of the Court of Appeal in *Lamb* v. *Evans* (2), to doubt what the decision on this appeal ought to be. There may be a distinction between the inferences of fact that would be drawn in different cases. As I have said more than once during the argument, it is not a question of law; it is a question of fact to be derived from all the circumstances of the case what is the nature of the contract entered into between the parties.

My Lords, I thought that we had arrived at some sort of concurrence by the learned counsel in the course of the argument that, on the construction of this 18th section, there were, at all events, two propositions that could not be disputed. The first was that the bargain between the parties involving this question of copyright need not be in writing: as to that I understand there is no dispute now that it need not be in writing. Secondly, that no express words were necessary in order to constitute the contract contemplated by the statute. One of the learned counsel has, I think, repudiated agreement with that proposition; the other, I think, without prejudice to his learned leader's argument, is disposed to concede it. But whether they are in agreement or not, I can entertain no doubt that this, like a great many other things in law, is one of those inferences which you are entitled to draw, but for which you can lay down no abstract rule. That which may be implied in a contract must depend very much on what the nature of the contract is, and whether or not the written contract displaces every other term whatsoever; because, in the infinite variety of dealings among mankind, there are some things which no one would think of expressing in terms, although undoubtedly they would form part of any contract made on such a subject.

(1) 16 C. B. 459. (2) [1893] 1 Ch. 218, 233.

Although the decision in *Sweet* v. *Benning* (1) is open to review in this House—in the sense that we are not estopped from considering it as we should be by a decision of our own House—yet where a state of law has been recognised for half a century, and confirmed by the Court of Appeal, it would be, I think, a startling novelty for your Lordships to treat that as res integra, which we should determine for ourselves without reference to previous decisions. I should feel great hesitation in disagreeing with any proposition that had been laid down by a Court presided over by such judges as those who decided *Sweet* v. *Benning*. (1) I doubt very much whether in the whole history of English law it would be possible to find a collection of learned judges of keener intellect and more profound learning than those who decided that case—Jervis C.J., Maule J., and Cresswell J. Speaking for myself, and remembering the sort of reputation those learned judges had when I was practising at the bar, and the authority given to their decisions, he would have been a very bold man indeed who, when those three judges agreed—not to mention Crowder J. —would have ventured to question the authority of a decision of theirs. And that decision was confirmed by Lord Lindley, Bowen L.J., and Kay L.J.

The judges in the Common Pleas were unanimous in their decision that you could infer from the facts that the copyright was intended to belong to the publisher, though there was no express contract on the point. People do not spend money except upon the hypothesis that they will get something for it, and unless you give to the bargain the effect which the language itself seems to import, that the person who is the projector, the publisher, and who is called "the proprietor," is to stand in the shoes of the actual author, he would get nothing for his money; the whole object of his publication might be defeated the very next day by the very person to whom he had paid the money. It seems to me it would be a most unreasonable inference to draw from the facts in proof in this case if I were not to suppose that the person who paid

(1) 16 C. B. 459.

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that money and incurred that risk—I think to the extent of 19,000*l.*—was not to have the complete right, such as the original author would have had if it were not published in this way, to publish it himself. Therefore, my Lords, I think the judgment ought to be reversed.

Upon the other question, the meaning of the words "separately published," I have not actually formed any opinion. It seems to me to involve a considerable amount of doubt and difficulty, and I propose to leave that question, because it is not necessary to decide it for the purposes of the present case. I move your Lordships that the judgment be reversed.

LORD SHAND. My Lords, as your Lordships have resolved that there shall be no decision given on the question which has been raised under s. 2 of the statute as to the effect of the words "separately published," I shall say no more than that I am certainly not prepared, from the arguments we have heard, to agree with Vaughan Williams L.J. in what he alone has said on that subject.

With reference to the case otherwise, I agree with what has fallen from my noble and learned friend on the Woolsack. I quite agree with what was decided in *Sweet* v. *Benning* (1), and if this question had now come up for the first time I should have been disposed to agree entirely in the general view taken by Vaughan Williams L.J. upon it. Looking at all the circumstances in the present case, it appears to me that the articles are contributed on the footing that on payment under such employment the copyright shall become the property of the publisher.

On these grounds, my Lords, I am of opinion that the decision of the Court of Appeal should be reversed.

LORD DAVEY. My Lords, I am of the same opinion. If this matter could be regarded as res integra, I think there would be a great deal to be said upon the construction of the

(1) 16 C. B. 459.

18th section—that it was for the publisher to prove an agreement that the author was employed upon the actual terms that the copyright should belong to the publisher. But any such proposition as that would be inconsistent with the law as laid down in *Sweet* v. *Benning* (1) and the more recent case of *Lamb* v. *Evans*. (2) I am certainly not disposed to question the authority of *Sweet* v. *Benning* (1), which was the decision of a very strong Court given nearly fifty years ago. And it has no doubt been frequently acted on since that time.

The law which I understand to be laid down in *Sweet* v. *Benning* (1) is that it is not necessary, according to the true construction of the 18th section of the Copyright Act, that you should find an actual agreement that the copyright should belong to the proprietor; nor indeed is it even necessary to find special circumstances which lead to that conclusion. In *Sweet* v. *Benning* (1), the special case upon which the opinion of the Common Pleas was delivered contained a statement that nothing was said between the parties affecting copyright. I can find no special circumstances stated in the special case, and the decision seems to me to have been founded only upon the nature of the employment, the nature of the publication, and the relation of the parties.

Joyce J. says in his judgment in the present case: "I decide this case on the short ground that I see no special circumstance either in the nature of the work or in the terms or in the nature of the employment from which I must infer that which is not expressed, namely, that the copyright is to belong to the publishers." That being so, he says in another passage that the consequence would not be different from what it would be in an ordinary case. I do not think that that decision was consistent with *Sweet* v. *Benning* (1) or *Lamb* v. *Evans*. (2) I think that what the Court has to do is to look at all the circumstances of the case and to say as a jury what is the inference which you would draw, or, as Bowen L.J. puts it in his judgment in *Lamb* v. *Evans* (2), what is the way in which business men would look at the question.

(1) 16 C. B. 459. (2) [1893] 1 Ch. 218, 233.

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The circumstances here are that the publisher is minded for his own profit to publish an encyclopædia of sport; he is prepared to spend, and he does spend, a very large sum of money, amounting to some thousands of pounds, upon the enterprise in which he is engaged; he employs a gentleman to act as editor and also to write some of the articles at a given salary, and through the editor he employs another gentleman to write articles for a given remuneration. Those are all the material facts of the case; and I have to ask myself what is the inference that I draw from those facts. That, I repeat, is a matter of fact and not a matter of law. No doubt one may gain some assistance from the way in which a similar set of facts has been regarded in other cases; but after all, where it is a question of fact each case must stand upon its own merits.

My Lords, if I were to express my opinion as a juryman upon the facts I have mentioned, I should say that it was one of the terms on which these gentlemen were employed to write articles for the encyclopædia that the copyright should belong to the proprietor; and I say so for this reason. The encyclopædia was to be his property, it was to be his book, he was to enjoy the benefit and receive the profit to be derived from its publication; and, therefore, I should assume that in buying the articles written by these gentlemen the inference is that both parties intended that the proprietor should have the right that was necessary for him adequately to protect the property which he had purchased, and the enterprise for the purpose of which these articles were intended to be used. In my judgment he could not adequately protect the articles which he had purchased, or his property in the book for the purpose of which the articles were written and purchased, without having the right to prevent an invasion of the copyright in those articles. Therefore the inference I should draw would be the same as was drawn in *Sweet* v. *Benning* (1) and *Lamb* v. *Evans* (2); and I am prepared to adopt every word of the judgments of Bowen L.J. and of Kay L.J., as well as the

(1) 16 C. B. 459. (2) [1893] 1 Ch. 218, 233.

judgments in the earlier case. I will read one passage from the judgment of Kay L.J. (1): "What is the fair inference from the facts of the case? Surely the inference is that the man who is to go to the expense of printing and publishing this book will, as between him and the agents he may have employed to assist him in the compilation of it, have in himself whatever property the law will give him in that book. That is the inference I should certainly draw; and, I think, in this case it is sufficiently clear, in the absence of evidence to the contrary, that the terms of employment of those several agents involved this—that the copyright in the portions of this book which they composed should belong to the owner of the book."

My Lords, with regard to the other question, the construction of the words "separately published" in s. 2 of the Copyright Act of 1842, I will only say that I think it is a question of some difficulty and it is one which it is not necessary to deal with for the decision of this case, and therefore I shall not express any opinion upon it.

LORD ROBERTSON. My Lords, in my opinion this case ought to have been decided on the authority of *Sweet* v. *Benning* (2) and *Lamb* v. *Evans* (1) as furnishing a principle applicable to the facts of the present case.

I do not think that the conclusion which I support is accurately described as inferring one of three statutory requirements from the existence of two. Whether that inference be legitimate or not must depend on the nature and the conditions of the employment; and the cases to which I refer do nothing to take the question out of the region of fact. But it is obvious that the facts of employment and of payment stand in a different category from the terms on which employment and payment take place, those terms being necessarily an element or ingredient in the employment, and not a separate or independent fact.

Accordingly the view of the two Lords Justices about the three conditions all requiring, by the structure of the section, to be proved, really means that an express agreement about

(1) [1893] 1 Ch. 218, 233. (2) 16 C. B. 459.

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copyright must be proved, or the writer retains the copyright. Unable as I am to accept this view, which is opposed to the decision in *Sweet* v. *Benning* (1), and indeed was not supported by Mr. Scrutton, I am free to consider what is primâ facie the proper inference; and I prefer, on its merits and also from its authority, the inference of *Sweet* v. *Benning*. (1)

I desire to say that I do not proceed at all on the argument on the words "separately published," which was raised at a late stage in the Court of Appeal and was apparently adopted by Vaughan Williams L.J.

Order of the Court of Appeal and judgment of Joyce J. reversed with costs both here and below: registration of respondents' copyrights expunged by consent: cause remitted to the Chancery Division.

Lords' Journals, November 13, 1903.

Solicitors: *Elkin & Henriques; Field, Emery, Roscoe & Medley.*

(1) 16 C. B. 459.

[HOUSE OF LORDS.]

COMPANY OF PROPRIETORS OF THE KENT WATERWORKS AND ANOTHER . } APPELLANTS ;

AND

LAMPLOUGH . . . . . RESPONDENT.

H. L. (E.) 1903 Dec. 14.

Waterworks Company—Surplus Profits—Dividend—Prescribed Rate—Making up Deficiency of Previous Dividend—Deficiency prior to Incorporation of General Act—Waterworks Clauses Act, 1847 (*c.* 17), *ss* 1, 75.

A water company, one of whose special Acts incorporates the Waterworks Clauses Act, 1847, has no power to apply its surplus profits in making up to its ordinary stockholders any deficiency in the prescribed rate of dividend, or a full 10*l.* per cent. dividend (if that is the prescribed rate), for any years before the time when the Waterworks Clauses Act, 1847, was made applicable to the company.

The decision of the Court of Appeal, [1903] 1 Ch. 575, affirmed.

THE appellants were originally incorporated by an Act of 1809. In 1864 an Act (27 & 28 Vict. c. cxlvi.) was passed amalgamating the North Kent Waterworks Company with the appellants. By s. 2 the Waterworks Clauses Act, 1847, was incorporated with the Act. By s. 27, "The several provisions of this Act with respect to water supply and water rates or rents, and all incidental matters, including the several provisions incorporated with this Act of the Waterworks Clauses Acts, 1847 and 1863 . . . . apply from and after the passing of this Act to the whole of the undertaking and waterworks of the company."

No special rate of dividend was prescribed by the company's Acts for the ordinary stock.

The company having proposed to make up the deficiencies below 10*l.* per cent. of the years between 1809 and June 30, 1864 (the passing of their Act of 1864), Joyce J., upon the application of the respondent, a holder of 7 per cent. preference stock, granted an injunction restraining the company from declaring or paying any dividend on any of the ordinary stocks in respect of or so as to make up any deficiency or alleged

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COMPANY OF PROPRIETORS OF KENT WATERWORKS v. LAMPLOUGH.

deficiency of dividend which might have occurred before June 30, 1864. This decision was affirmed by the Court of Appeal (Collins M.R., Romer and Cozens-Hardy L.JJ.). (1)

Cripps, K.C., and *Haldane, K.C.* (*R. J. Parker* with them), for the appellants. The question turns mainly upon s. 75 of the Waterworks Clauses Act, 1847, which runs thus:—

"The profits of the undertaking to be divided among the undertakers in any year shall not exceed the prescribed rate, or where no rate is prescribed they shall not exceed the rate of ten pounds in the hundred by the year on the paid-up capital of the undertaking, which in such case shall be deemed the prescribed rate, unless a larger dividend be at any time necessary to make up the deficiency of any previous dividend which shall have fallen short of the said yearly rate."

The effect of the first part of the section is this: Suppose the entire capital of the company is 100,000*l.*—50,000*l.* in preference 5 per cent. stock, and 50,000*l.* ordinary, and the profits of one year are 10,000*l.*, the preference shareholders get 2500*l.* in dividend. Therefore the ordinary shareholders have 7500*l.* to divide, i.e., 15 per cent. The whole dividend is not above 10 per cent.: how that is apportioned is merely a domestic question for the company. Now suppose the company earns one year 9000*l.* and the next year 11,000*l.*, the latter part of s. 75 applies, and the company is entitled to apply the surplus 1000*l.* to make up the deficiency of the previous year. Then what is the meaning of the word "previous"? There are no words in the Act to confine it to the time since 1864. The word "dividend" there means what may or is to be divided by the company, not the sum each shareholder receives, not the quotient in the ordinary use of the word "dividend." The Act is retrospective, and "any previous dividend" means all since the incorporation of the company in 1809. The Court of Appeal were misled by their own copious use of the words "back dividends."

Moulton, K.C., *Younger, K.C.*, and *Ashworth James*, for the respondent, were not heard.

(1) [1903] 1 Ch. 575.

EARL OF HALSBURY L.C. My Lords, this is a case that may be treated very shortly. It depends upon one section, and it exhibits the ingenuity of the learned counsel that a matter depending upon such a very small number of words could be protracted through three Courts and argued with the ability and pertinacity with which this case has been argued. For my own part it seems to me to be absolutely clear, without the faintest shadow of doubt.

The Act of Parliament, which imposed for the first time a limit upon the amount of the dividend that might be distributed among the shareholders, contains also a provision that if that dividend which was to be limited for the future had not been arrived at, then in distributing the future profits of the company that which had fallen short of the prescribed amount which for the first time was then imposed might be made up if the company had made a profit sufficient to supply it. The whole language is very intelligible, and upon the hypothesis that that is the true view of it which both Courts have already arrived at it is very simple.

My Lords, if the gloss which has been put upon it by the learned counsel who argued the appeal were true, I think it would be extremely difficult to reconcile the language with any intelligible meaning, because what is to be made up under s. 75 is a "deficiency." A deficiency of what? There is no deficiency at all in any of the years previous to 1864: you can only get a deficiency by bringing in that limit which was for the first time prescribed in 1864. It is an impossible hypothesis: you cannot get a deficiency—there is nothing from which it is a deficiency—unless you import that limitation, a dividend which comes to 10 per cent. Then if that is the only thing that is to be made up, that deficiency can only arise after 1864; and according to the plainest rules of construction, you cannot get behind that which for the first time imposed the limit to which the deficiency is to be made up.

Under these circumstances it appears to me abundantly plain, and I move your Lordships that this appeal be dismissed.

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LORD MACNAGHTEN. My Lords, I am of the same opinion. I think the case is perfectly clear. I am of opinion that for the purpose of adjusting dividends and availing itself of the statutory provision for compensation the company cannot go further back than the time when the Act of 1864 came into operation. The Kent Waterworks Company made a fresh start then, with fresh limitations and under new conditions. Before that time there was no prescribed rate of dividend, nor could there be any deficiency of dividend within the meaning of that expression in the Waterworks Clauses Act.

LORD SHAND. My Lords, I am of the same opinion. I have only to add that I am not surprised that Joyce J., when he called for no argument from Mr. Younger for the respondent, stated that he did not feel any doubt about it. I agree in his judgment, in the unanimous judgment of the Court of Appeal, and in that which your Lordships have delivered.

LORD DAVEY. My Lords, I think there can be no doubt about this case. I am quite satisfied with the reasons which have been given by Joyce J. and the learned judges in the Court of Appeal.

LORD ROBERTSON. My Lords, I entirely agree.

LORD LINDLEY. And so do I.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, December 14, 1903.

Solicitors: *Hollams, Sons, Coward & Hawksley; Waltons, Johnson, Bubb & Whatton.*

[HOUSE OF LORDS.]

MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF WAKEFIELD . } APPELLANTS; H. L. (E.) 1903 Dec. 15.

AND

COOKE AND OTHERS . . . . . RESPONDENTS.

Local Government—Streets—Private Street Works—Determination that Street is a Highway—Estoppel—Res Judicata—Judgment in Rem — Private Street Works Act, 1892 (c. 57), *ss.* 6, 7, 8.

In proceedings taken by an urban authority under the Private Street Works Act, 1892, ss. 6, 7, 8, to compel owners of premises to do private street works in a street, the determination by a Court of summary jurisdiction that the street is a highway repairable by the inhabitants at large is a judgment in rem and conclusive as to the status of the street, and the question whether it is so repairable is res judicata in any future proceedings under these sections.

So *held* in a case arising under similar sections in the Wakefield Corporation Act, 1887.

The decision of the Court of Appeal, [1903] 1 K. B. 417, affirmed.

IN 1901 the appellants passed resolutions in pursuance of the Wakefield Corporation Act, 1887 (50 & 51 Vict. c. lxxi.), that certain private street works should be done in a private street in Wakefield called Sludge Lane, and the expenses apportioned among the owners of adjoining premises. The resolutions were duly published and notices served upon the owners liable to be charged. The respondents as owners of premises raised the objection under s. 30 of the Act that Sludge Lane was a highway repairable by the inhabitants at large. Two justices sat as a Court of summary jurisdiction for the city under s. 31 of the Act "to hear and determine the matter of" the objection. The respondents contended that the matter was res judicata, because in 1898 a Court of summary jurisdiction sitting under s. 31 to hear and determine the very same question had determined that Sludge Lane was a highway repairable by the inhabitants of the city of Wakefield at large. The question then raised was between the appellants and the same owners

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as were concerned in 1901, with very few exceptions. The Sludge Lane which was adjudicated upon in 1901 was the Sludge Lane adjudicated upon in 1898 with an addition of eighty yards.

The justices determined that the matter was res judicata and declined to go into the merits of various objections raised by the appellants, and they stated a special case for the opinion of the High Court. The King's Bench Division (Lord Alverstone C.J., Darling and Channell JJ.) reversed the decision of the justices. (1) The Court of Appeal (Vaughan Williams, Stirling and Mathew L.JJ.) reversed the decision of the King's Bench Division and confirmed the decision of the Wakefield justices. (2) Hence the present appeal.

The material sections, 29, 30, and 31 of the Wakefield Corporation Act, 1887, are set forth in both the reports below. They are in substance identical with ss. 6, 7, and 8 of the Private Street Works Act, 1892, c. 57.

C. A. Russell, K.C., and *William Senior*, for the appellants. This is in substance an appeal from *Reg.* v. *Hutchings*. (3) There the Court of Appeal (Lord Selborne L.C., Baggallay and Brett L.JJ.) held that the adjudication of the magistrates that the street was repairable by the inhabitants at large was not a judgment in rem, nor a judgment inter partes, though the parties were the same, and that the question whether it was so repairable was an open one. The Wakefield Act is no doubt in different terms, but there are no words making the decision of the magistrates conclusive. The object of the Legislature was to have the liability of the owners to do the works determined before any expense was incurred, and to substitute for the Public Health Act, 1875, more convenient legislation. The parties concerned in 1898 and 1900-1 were different.

[They referred to the cases cited in the Court of Appeal and to *North Eastern Ry. Co.* v. *Dalton Overseers*. (4)]

Danckwerts, K.C., and *Compston*, for the respondents. The

(1) [1902] 1 K. B. 188.
(2) [1903] 1 K. B. 417.
(3) (1881) 6 Q. B. D. 300.
(4) [1898] 2 Q. B. 66.

adjudication of the justices was a judgment in rem within the definition given by John William Smith himself in 2 Smith's Leading Cases, 1st ed. p. 439; 6th ed. p. 699; 11th ed. p. 752, a definition approved and left untouched by each of the numerous and distinguished editors: "A judgment in rem I conceive to be an adjudication pronounced (as indeed its name denotes) upon the status of some particular subject-matter, by a tribunal having competent authority for that purpose. Such an adjudication, being a most solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared, concludes all persons from saying that the status of the thing adjudicated upon was not such as declared by the adjudication." Then follow cases, some of which were discussed in the Court of Appeal (1) and in *Reg.* v. *Hutchings*. (2) In the present case this was an adjudication upon the status of the street. It is not therefore necessary to shew that it was a judgment between the same parties. In substance it was so. In *Reg.* v. *Hutchings* (2) Lord Selborne seems to have laid down some doubtful law, with which Baggallay L.J. evidently could not agree, though he would not go the length of differing. However that may be, it is immaterial. The Wakefield Act, which is in identical terms with the Private Street Works Act, 1892 (c. 57), ss. 6, 7, 8, explicitly by ss. 30, 31 gives the justices jurisdiction to determine "the matter of all objections," and one of the objections is "that a street or part of a street is (in whole or in part) a highway repairable by the inhabitants at large." There were no such provisions in the Public Health Act, 1875, with which alone *Reg.* v. *Hutchings* (2) was concerned. The Legislature no doubt intended to remedy this defect in that Act and to enable the question whether it was a highway repairable by the inhabitants at large to be settled once for all, and shewed their intention first in private Acts such as the Wakefield Act, and secondly by a general public Act in 1892.

Senior, in reply.

EARL OF HALSBURY L.C. My Lords, although I do not deny the local importance of this case, and indeed the importance of

(1) [1903] 1 K. B. 417. (2) 6 Q. B. D. 300.

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it generally, it seems to me that it lies within a comparatively short compass. I think the matter becomes clear if one looks at the corresponding section of the Public Health Act, 1875 (the 150th section) and observes what has been the question in doubt in some of the cases arising under that Act, and then compares it with the local Act with which your Lordships are dealing here.

In the Public Health Act the mode in which the matter is dealt with is this: "All streets being or which at any time become highways repairable by the inhabitants at large" are by the 149th section given to the jurisdiction of the urban authority. Then the 150th section gives the urban authority jurisdiction in certain cases over "any street within any urban district (not being a highway repairable by the inhabitants at large)."

The urban authority is empowered to give notice to the owners of property in a private street which requires them to flag, channel, and otherwise to deal with the particular place which is under their authority by reason of the 150th section, and if the owners do not do what they are ordered to do by the urban authority they can do it themselves; whereupon the magistrates are empowered to enforce by a proper order the payment of those expenses. In *Reg.* v. *Hutchings* (1) what happened was this: the magistrates before whom the question came as to whether or not certain expenses (400*l.* odd) had been incurred thought proper to enter into the question of whether or not it was properly proved that the street was not a public street, but a private road within the 150th section. I have looked to find some jurisdiction given to the magistrates to enter into that question, and I can find none. The only thing I can suppose is that it was argued that, inasmuch as this power given under the 150th section depends upon the question of the street with which they are dealing not being a highway repairable by the inhabitants at large, that was one of the necessary facts to be proved to give the magistrates jurisdiction in order to issue their process and enforce the payment of those expenses. I must say, so far as that case is concerned,

(1) 6 Q. B. D. 300.

I entirely concur with the judgment; they had no such jurisdiction: they were not invested with any such power. The only thing which the Legislature confided to them was that they should issue process to compel payment of something which the urban authority had paid for themselves by reason of the disobedience of persons upon whom the notice had been served. As to that case, I think it was quite rightly decided.

But let us turn for a moment to the statute which is before your Lordships, and the distinction will be at once apparent. Instead of its being left to the determination of the local authority to give notice, and when that notice is disobeyed to do the work themselves, and thereupon when they have done the work themselves to sue for the amount against the person who disobeyed their order—instead of that, a whole machinery is created by which the question of whether or not the street is repairable by the parish shall be determined by a particular tribunal—a tribunal erected for this express purpose; and when one looks to see what that particular forum erected for that purpose is to determine, it is sufficient to see the number of objections which can be made and what has to be determined: "(*a*) That an alleged street or part of a street is not or does not form part of a street within the meaning of this Act" (that is a question which relates to a different class of things that the urban authority have got to do). "(*b*) That a street or part of a street is (in whole or in part) a highway repairable by the inhabitants at large." So that, instead of being, as it is, under the Public Health Act, something removed from the jurisdiction of the justices, who have only power to issue process and enforce the payment of a sum of money payable under the circumstances stated in the 150th section, in this Act the very question whether or not a particular road is or is not a highway repairable by the parish is remitted to that tribunal, and remitted to that tribunal for the purpose of determination.

My Lords, for my own part I am wholly unable to see anything more in the nature of a judgment in rem than that, and although I desire not to be bound by it, because I think it unnecessary after what I have said to enter into that question,

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yet I must say where you have a corporation on the one side and objectors capable of coming in, and receiving notice to come in, in respect of a particular matter on the other side, it comes very near to shewing that it is a proceeding between the same parties—an adjudication between the same parties.

My Lords, for my own part I am quite prepared to base my opinion upon the subject on the hypothesis that it is a judgment in rem. It is a judgment as to the status of that street; and that judgment as to the status of that street is, it is said, subject to appeal. Mr. Russell, I think, told us it was subject to appeal to quarter sessions. He has not pointed out to us where the appeal comes, and I have not found it; but whether it is subject to appeal or not seems to me to be immaterial. If there is no appeal, it is a final adjudication and determination. If there is an appeal, I presume from what has happened the question was in this case determined adversely to those who are at present the appellants against the judgment of the Court of Appeal. In any case it appears to me that this question has been finally and absolutely determined; and I must say I rather concur with what has been suggested by Vaughan Williams L.J. that the probability is that a section of this character or a statute of this character was introduced by reason of the difficulty that had arisen under the Public Health Act. If you look carefully into the matter you find that there was no one who had any power of litigating the question when once the local authority had thought proper to give the notices. There is no forum that I can see created by the statute before whom that question can come, and all that is to be done is that they are to recover the expenses against any person who has disobeyed the order. Probably there must be some method of removing the order if made without jurisdiction; perhaps it might be removed by a certiorari to the King's Bench; but certainly no such proceeding is contemplated by the Public Health Act as is created by the Wakefield Act.

Under these circumstances, it appears to me that it is an order made by the justices who are called on by the provisions of the statute to exercise that jurisdiction. They have

exercised that jurisdiction. They have acted within their powers, and it seems to me that the adjudication they have made is conclusive and properly conclusive, getting rid of a great many awkward questions which might otherwise arise. It appears to me, therefore, that this appeal ought to be dismissed with costs, and I move your Lordships accordingly.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD SHAND. My Lords, I am of the same opinion. I entirely concur in what has been said by the noble and learned Lord on the Woolsack. I desire only specially to add that I think Vaughan Williams and Mathew L.JJ. have stated clearly the distinction which exists between this case and the case of *Reg.* v. *Hutchings* (1) which deprives that case of any authority in the present case.

LORD DAVEY. My Lords, I am of the same opinion.

The point on which I differ from the judgment of the Lord Chief Justice may be put very shortly, and it is this: he seems to have thought that the primary jurisdiction of the 31st section of the Act of 1887 was either to quash or to amend the proceedings, and that the power to determine the matter of the objection was merely incidental and leading up to that jurisdiction. I take a wholly different view of the construction of the 31st section. I think their primary jurisdiction is to proceed to hear and determine the matter of all the objections—that is their first and their main duty; and then, as consequential upon that duty and incident to it, they may—but they are not bound to do so—they may, on the application either of the objectors or the corporation, proceed either to quash in whole or in part, or to amend, the resolutions, &c., which form the subject of the proceeding.

This view shews the distinction between this case and *Reg.* v. *Hutchings* (1) which the Lord Chief Justice thought governed this case. I cannot put the distinction between this case and that more clearly than it has been put by

(1) 6 Q. B. D. 300.

H. L. (E.) 1903 WAKEFIELD CORPORATION v. COOKE. Lord Davey.

Vaughan Williams L.J. Shortly stated, it is, in my opinion, this: that in *Reg.* v. *Hutchings* (1) Lord Selborne and the learned judges who sat with him thought that the matter on which the decision of the magistrates was said to be res judicata was one which they had no jurisdiction to entertain per se—that they had no jurisdiction whatever to decide whether a road was or was not a highway; they had jurisdiction to decide whether a sum of money was due from a particular individual to the corporation, and for the purpose of determining that question it might be necessary for them incidentally to express an opinion upon the question of whether a road was a highway repairable by the inhabitants at large or not; but, supposing that to be so, that would not make an incidental determination of that kind res judicata in a subsequent proceeding in which that question came into prominence.

I agree with Vaughan Williams L.J. also that this decision of the magistrates, if not in form a judgment in rem, was at all events in all its essentials a judgment in rem. And I also agree that if it be not strictly a judgment in rem so as to make it conclusive upon all the world, all persons who were called by being served with notice of the proceedings and had an opportunity of attending and supporting or opposing the objection must be bound by the decision of the magistrates, and none the less because they did not think fit to attend, but left the objection to be fought by other people.

LORD ROBERTSON. My Lords, I was at first inclined to share the doubts of Stirling L.J., but the argument of Mr. Danckwerts has satisfied me that the judgment of the Court of Appeal is right. The question is truly whether the local Act has given the justices jurisdiction to determine whether the street in dispute is a highway repairable by the inhabitants, as a substantive issue, in rem, or merely as a medium concludendi of the liability or non-liability of the objectors. If the former be the true view, then a decision on that issue, properly raised, is good against all concerned. There is nothing

(1) 6 Q. B. D. 300.

contrary to principle and much convenience in a local tribunal being authorized to adjudicate on a local matter with full notice to all concerned; and the question is merely whether in this instance that has been provided by the Legislature. On the whole, I have come to think that it has, and that the appeal therefore fails.

LORD LINDLEY. My Lords, I am of the same opinion. It appears to me that the question turns on the fact which occurs in this case, and which did not occur in *Hutchings' Case* (1), namely, the fact that the question raised for the purpose of being decided in accordance with the Act and the question which was decided in accordance with the Act was whether Sludge Lane was a street repairable by the inhabitants at large or not. If there had been no such matter expressly raised and determined, *Hutchings' Case* (1) would have had an important bearing; but as it is, I have not the slightest doubt that this appeal ought to be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, December 15, 1903.

Solicitors: *Sharpe, Parker & Co., for C. J. Hudson, Wakefield; Seaton F. Taylor, for J. B. Cooke, Wakefield.*

(1) 6 Q. B. D. 300.

[HOUSE OF LORDS.]

H. L. (E.) 1903 Dec. 17.

GUARDIANS OF THE POOR OF THE WEST HAM UNION IN THE COUNTY OF ESSEX . . . . . } Appellants;

AND

LONDON COUNTY COUNCIL . . . . Respondents.

Poor Law — Pauper — Parish of Settlement—Addition to Parish—Divided Parishes and Poor Law Amendment Act, 1876 (*c.* 61)—*Poor Law Act*, 1879 (*c.* 54).

Parish A., to the area of which an addition has been made out of parish B., by an order under the Divided Parishes and Poor Law Amendment Act, 1876, does not lose its identity, and the settlement of a pauper in parish A. is not affected.

The decision of the Court of Appeal, [1902] 1 K. B. 562, affirmed.

Query, whether *Reg.* v. *Tipton*, (1842) 3 Q. B. 215; 61 R. R. 203, and the cases following it were rightly decided.

Elizabeth Heritage, a pauper lunatic, was born in the parish of West Ham in the West Ham Union, Essex, in 1852, and resided there for seventeen years, so as to render her irremovable from the parish.

By an order of the Local Government Board, in August, 1886, made under the Divided Parishes and Poor Law Amendment Act, 1876 (c. 61), as amended and extended by the Poor Law Act, 1879 (c. 54), it was ordered that a certain part of the parish of Wanstead should cease to be part of that parish and should be amalgamated with the parish of West Ham.

The pauper lunatic left the parish of West Ham in 1888, and did not thereafter acquire a settlement in any parish, but in February, 1900, was adjudged chargeable to the county of London.

In May, 1900, the respondents procured from two justices of the county of London an order whereby the pauper lunatic was adjudged to be settled in the West Ham Union.

In July, 1900, the Court of quarter sessions for the county of London quashed that order on the authority of

Reg. v. *Tipton* (1) and *Dorking Union* v. *St. Saviour's Union* (2), holding that the reasoning of both those cases applied "not only to a district where a parish is divided, but also to where a district is destroyed by reason of amalgamation," and the Court stated a special case for the High Court.

The King's Bench Division (Darling and Channell JJ.) reversed the decision of quarter sessions and restored the order of May, 1900. (3) This decision was affirmed by the Court of Appeal (Collins M.R., Romer and Mathew L.JJ.). (4) Hence the present appeal.

Avory, K.C. (*C. C. Hutchinson* with him), for the appellants. A series of cases from *Reg.* v. *Tipton* (1) down to the *Dorking Case* (2) held that the division of a parish destroys a settlement. The same principle must apply to addition as to subtraction. The identity of the parish is equally gone. The parish is not the same when a portion of another parish is added. No provision for the retention of a settlement acquired in West Ham is to be found in any statute or in the order of the Local Government Board. The *Dorking Case* (2) is stronger than *Reg.* v. *Tipton.* (1) A settlement is a settlement in a parish as an entity and not in any particular township.

[They also cited the cases referred to in the Courts below.]

Macmorran, K.C., and *Daldy*, for the respondents, were not heard.

EARL OF HALSBURY L.C. My Lords, it appears to me that this is a novelty which has been presented to your Lordships for adjudication, and that it may be decided without reference to any of the previous cases. Whether those cases were right or wrong, whether if they came in actual review before your Lordships you would affirm the principle which seems to have guided them, or whether you would take the view which Cockburn C.J. and Blackburn J. both took (5), that the case upon which they all really depended had been decided upon a very

(1) 3 Q. B. 215; 61 R. R. 203.
(2) [1898] 1 Q. B. 594.
(3) [1901] 1 K. B. 720.
(4) [1902] 1 K. B. 562.
(5) *Stanbridge Union* v. *Droitwich Union*, (1871) L. R. 6 Q. B. 769.

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narrow—obviously in their view a too narrow—construction of the Act of Parliament, is a matter which one need not consider now, because it is unnecessary. Therefore I think it would not be proper to enter into an examination of those cases with reference to a case which really does not raise the same question. I have no doubt that what Cockburn C.J. and Blackburn J. both felt was this—that in a question of this sort which was constantly arising between parishes, more constantly then than in modern days, it was a very inconvenient thing to have different rules laid down by the Courts from time to time, thereby putting the overseers in great difficulties, and for that reason there was a great reluctance to interfere with rules which were supposed to be once established. I am not certain that that consideration is so important now, because controversies between parishes are now very seldom litigated in these matters. Be that as it may, I only mention it in order to point out that your Lordships are perfectly free, if the question ever does come in a distinct form before you, to consider those cases which after all only began in the year 1842, and may or may not be considered to have established a rule which it would be wrong to depart from now.

At all events, this is the first case of this class which has ever come before a Court of Appeal, and it appears to me that the answer to the ingenious argument which has been presented to us is that none of the circumstances upon which the other cases have been decided exist here. One can see that where a parish has disappeared, in this sense, that it has been broken up into four or five different parishes, it would be difficult to say that the settlement in the parish still continued, because the parish which once existed and in which the pauper had obtained a settlement no longer exists, and you could not say that he belonged to A., B., C., D., or E., because no such parish existed as that in which he got his settlement, and the mere appropriation of his settlement to some one of the new parishes would be, or ought to be, legislation and not decision. But be that as it may, in this case the pauper was settled in West Ham and now claims a settlement in West Ham; and what is to prevent her having it? Is there no identity in the parish by

reason of the same course of administration continuing, the same liabilities upon its inhabitants, the same duties to be performed by the officers of the parish? There is no doubt that everything that would constitute identity in an administrative body exists here, and it is upon the liability of that same administrative body that the pauper makes her claim. What is the answer to it? Not that there is any real change in the administration, not that there is any change in the very place where the pauper's settlement was obtained, but that something has been added to the parish afterwards, and that, it is said, is to make the whole difference in the rights and liabilities of the parish to which the addition has been made so as to deprive the pauper of his rights under the Act of Charles II. and those Acts which succeeded it, among others the right not to be removed and sent to some other place. I am wholly unable to follow the reasoning which suggests that this parish has changed its identity. It is the same parish in all the things which constitute identity of an administrative body, and the fact that a small part has been added to it so as to bring it within the area of that which is the unit for administrative purposes seems to me not in the smallest degree to interfere with the identity of that which is really the same parish which existed before. It would, indeed, be only an attempt at logic run mad to suggest that by reason of an addition to a parish it ceased to be the same parish, and became a new creature created by the mere fact of that addition. I am quite sure that nothing in the Act of Parliament which gave authority to make the addition to or to change the boundary of the parish could ever have contemplated that the effect would be to change the whole legal liabilities. As Mr. Avory very frankly and boldly admitted, if it arose on the question of a debt contracted by the parish of West Ham it would not be a good plea, apart from legislative remedy, to say that the parish had ceased to exist, and therefore the creditor could not recover and must lose his debt. That would be indeed reducing the matter to an absurdity.

I move your Lordships that this appeal be dismissed with costs.

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LORD SHAND. My Lords, I am of the same opinion, and as I entirely concur in the reasons for the judgment which have been expressed by my noble and learned friend on the Woolsack, and, indeed, with the reasoning of all the judges before whom the case has come, the judges in the Divisional Court and the judges in the Court of Appeal, I have really nothing to say except that I think there is identity of parish here, although an addition has been made to it to some extent.

LORD DAVEY. My Lords, I wish to speak with all the respect which is due to a judgment of the Court of Queen's Bench delivered so long ago as the year 1842, of the decision in *Reg.* v. *Tipton.* (1) I do not find it necessary for the decision of this case to say whether the reasoning upon which the decision in that case was founded is altogether satisfactory to my mind or not, because I think it is no authority for the decision of this case. This case is quite different in its circumstances, and what was said in *Reg.* v. *Tipton* (1) is no authority for the decision of this case. Nor do I think that the *Dorking Case* (2) is any authority for this case. If we were considering the case of Wanstead, the *Dorking Case* (2) might be an authority, because a piece has been cut out of the old parish of Wanstead and added to the parish of West Ham, and in that respect it would bear some resemblance to the *Dorking Case.* (2) But in the present case we have to deal with a case, not where a piece has been cut out of West Ham, but where a piece has been added from the parish of Wanstead to the parish of West Ham; and in that respect I think that the case is not governed by the *Dorking Case.* (2)

My Lords, I think the true test is that which has been suggested by the Master of the Rolls, namely, Has the parish in which the pauper had a settlement lost its identity? In *Reg.* v. *Tipton* (1) I can quite understand that the parish of Halesowen had ceased to exist. It had been divided into several townships, no one of which could claim to be the original parish of Halesowen. But in the present case I see no ground whatever for saying that the parish of West Ham

(1) 3 Q. B. 215; 61 R. R. 203. (2) [1898] 1 Q. B. 594.

has lost its identity. A parish does not lose its identity by the mere alteration of its boundary, or because a piece has been added to it, or, as I think, because a piece has been taken away from it. It must be a question of fact in each case whether what has been done has destroyed the identity of the parish; and it appears to me extravagant to say that if the boundary between two parishes is rectified by drawing a give and take line, so that each parish has a bit added to it and loses a bit, which is added to the next, those two parishes, therefore, have lost their identity, or that a pauper with a settlement in either of those parishes loses his settlement. It may be that a case similar to the *Dorking Case* (1) may some day come before us, and if it does I will examine it with an open mind; but it is sufficient for the present purpose to say that it is not a guide for the decision of the case now before the House. I doubt, however, whether the *Dorking Case* (1) would have been decided as it was had not the judges erroneously, as I think, thought it followed from the decision in *Reg.* v. *Tipton.* (2)

LORD ROBERTSON. My Lords, I entirely agree, on the grounds which have been stated by my noble and learned friend on the Woolsack.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, December 17, 1903.

Solicitors: *Hillearys; W. A. Blaxland.*

(1) [1898] 1 Q. B. 594. (2) 3 Q. B. 215; 61 R. R. 203.

[HOUSE OF LORDS.]

H. L. (E.) 1903 Dec. 18.

FITZSIMMONS . . . . . APPELLANT;

AND

LORD MOSTYN . . . . . RESPONDENT.

Landlord and Tenant—Lease—Construction—Renewal "at the Costs of the Lessee"—Costs of Reference and Award as to Amount of Fine.

By a covenant for renewal in a lease for years the lessor covenanted at any time during the term at the request and "at the costs of the lessee," and on payment by him of a fine calculated upon the number of the expired years of the term and the full improved annual value of the premises at the time of the renewal (the value to be determined by the lessor's surveyor or, at the option of the lessee, by two surveyors to be appointed by the lessor and the lessee respectively, and, in case of their differing, by their umpire), to renew the lease for a further term.

The lessee having required a renewal, and the parties being unable to agree as to the amount of the fine, the question of the improved annual value of the premises at the time of the renewal was referred to two referees or their umpire, and the umpire made an award:—

Held, that upon the natural and true construction of the covenant the costs of the reference and award were payable by the lessee as necessary costs of the renewal.

The decision of the Court of Appeal, [1903] 1 K. B. 349, affirmed.

THIS appeal turned entirely upon the special words of a covenant in a lease and involved no general principle.

By two indentures of lease premises in Llandudno were demised by Lord Mostyn's predecessors in title to the appellant's predecessors in title for seventy-five years from 1860. Each lease contained a covenant in the terms set out in the head-note. In 1900 the appellant requested a renewal, and, differences having arisen as to the amount of the fines payable, the appellant gave notice to the respondent that the full improved value of the premises should be determined by the award of two referees or their umpire. The umpire made an award, stating a special case for the opinion of the High Court (1.) whether upon the true construction of the leases the costs of renewal included the costs of the reference and award; (2.) whether (whatever construction was placed upon the leases) he had any power or discretion to deal with the costs.

Wright J. held (1.) that upon the true construction of the

leases the costs of renewal to be paid by the appellant did not include the costs of the reference and award; (2.) that the umpire had power or discretion to deal with the costs. (1) The Court of Appeal (Vaughan Williams, Stirling, and Mathew L.JJ.) reversed this decision, and held that the costs of renewal did include the costs of the reference and award, and that the umpire had no power or discretion to deal with the costs. (2)

Haldane, K.C., and *Marshall, K.C.* (*E. P. Hewitt* with them), for the appellant. This is a question of construction purely, and the natural construction of the words is that the costs of the renewal mean the ordinary conveyancing costs, such as drawing, settling, and completing; the costs of an arbitration would naturally fall under the power and discretion of the umpire under the Arbitration Act, 1889. Otherwise the lessor by insisting upon an outrageous fine might compel the lessee to incur heavy costs in having the fine brought down to a reasonable sum. No cases can throw light on this question. Nor can this case throw light on other leases. Each case must depend on its own words and circumstances.

Montague Lush, K.C., and *J. C. W. Madden*, for the respondent, were not heard.

EARL OF HALSBURY L.C. My Lords, in this case I am satisfied that the judgment of the Court of Appeal is entirely right; but I must add that I am not quite satisfied with some of the observations which were made by the learned judges, because it appears to me that we must construe these words as they stand. I do not know that we have anything to do with the reasonableness or unreasonableness of the landlord or the tenant: the question is upon what terms is the tenant to have his lease renewed. He is entitled by the language of the covenant to have his lease renewed on certain terms. At the commencement of everything the stipulation is that it is to be "at the costs of the lessee"; and the whole question here is, What is to be included in that word "costs"? I should have thought that Stirling L.J.'s observation decided

(1) [1902] 1 K. B. 512. (2) [1903] 1 K. B. 349.

H. L. (E.) 1903 FITZSIMMONS v. MOSTYN (LORD). Earl of Halsbury L.C.

the whole question, namely, those things that are necessarily incurred by reason of the renewal. The landlord is to be at no cost. Whether the landlord was unreasonable or not seems to me to be immaterial; no such question arises here, and I would rather deprecate the discussion of it, because everybody admits here that there is nothing to be imputed to either side.

The reason why I make my protest is that I do not think, where there are plain words used in an instrument of this sort, you can give a different interpretation according to the state of the facts to which they are applied. If these were costs at all—other questions might of course arise where it was suggested that they were not included within the costs—but if these were costs at all, and therefore the words apply to them, it appears to me that we have nothing to do with the merits of the two parties, whether they were reasonable or unreasonable towards each other; the only question is what is the true construction of these words. I think the Court of Appeal have arrived at the true construction of these words according to their plain and ordinary meaning; and therefore I think the judgment of the Court of Appeal was right, and I move your Lordships that this appeal be dismissed.

LORD SHAND. My Lords, I am entirely of the same opinion. I think the question is one simply of construction, namely, what is the meaning of the clause contained in this lease in regard to the expenses of renewal. I also think that Stirling L.J. has put it in a sentence when he says: "What is to be renewed is the term, and it seems to me that the fair and ordinary meaning of the language is that the lessee is to bear all the costs which are necessarily and properly incurred by the lessee for the purposes of the renewal." In the course of the renewal one of the parties, the lessee, was entitled to say whether the value should be fixed by the surveyor or by arbitration. If he had taken the surveyor, there might have been less costs incurred; but if an arbitration became necessary in consequence of questions between the parties, I think the expenses of that arbitration are costs which have been incurred for the purposes of the renewal.

Lord Shand.

For my own part I should add that if a case arose in which the conduct of the lessor clearly caused much greater cost than was necessary for the renewal of the lease it may be that, to the extent of such greater and unnecessary cost under the construction of the contract, the lessee would not be liable for such cost. But nothing of the kind has arisen here.

We have here simply costs which the parties contemplated would be incurred when they entered into this agreement, and I am satisfied that the learned judges were right in holding that these costs must fall upon the tenant.

LORD DAVEY. My Lords, I agree, and I have nothing to add.

LORD ROBERTSON. My Lords, if the appellant's argument is good about the costs of arbitration, it must be good also about the surveyor's fee where the value is fixed in that way; for the one mode is alternative to the other and at the option of the lessee. The operation to be performed by the surveyor or by the referees is fixing the annual value. I cannot bring myself to see how this is not part of the process of renewing the term.

LORD LINDLEY. I also am of the same opinion. It appears to me that the attempt to construe this as a covenant to renew at the expense of the lessee and to cut down these expenses to what are called the ordinary expenses of renewal, and then to construe the rest of the clause as another covenant to pay the fine, is not in accordance with the words used. The bargain evidently is if the lessee wants renewal he is to ask for it; he is to pay for it, and to pay whatever is necessary in order to obtain it. I think it is too clear for argument.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, December 18, 1903.

Solicitors: *Belfrage & Co., for Chamberlain & Johnson, Llandudno; Hulberts, Hussey & Metcalfe.*

BIBL. LONDIN UNIV.

[HOUSE OF LORDS.]

H. L. (Sc.) 1903 Nov. 24.

EARL OF GALLOWAY . . . . . APPELLANT;

AND

DOWAGER COUNTESS OF GALLOWAY RESPONDENT.

Scottish Law—Entail—Restriction—Provision for Widow—Deduction from Free Rental—Entail Provisions Act, 1824 (*Aberdeen Act*), 5 *Geo.* 4, *c.* 87, *s.* 1.

By s. 1 of the 5 Geo. 4, c. 87, it was provided that the annuity to the widow of the deceased heir of entail "shall not exceed one-third part of the free yearly rent of the said lands and estates where the same shall be let, or of the free yearly value thereof where the same shall not be let, after deducting the public burdens, life-rent provisions, the yearly interest of debts and provisions, including the interest of provisions to children . . . . and the yearly amount of other burdens of what nature soever affecting and burdening the said lands and estates, or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or value thereof to such heir of entail in possession, all as the same may happen to be at the death of the grantor":—

Held, affirming the decision of the Second Division of the Court of Session, that on the calculation of the widow's annuity the heir of entail in possession was not entitled to make deduction for upkeep of estate, buildings, and fences, or for management and superintendence of the estate, these outgoings not being, in the sense of the statute, burdens affecting either the estate or its rents.

APPEAL from the Second Division of the Court of Session, Scotland. (1)

The appellant, the Earl of Galloway, heir of entail in possession of the estates of Galloway, Baldoon, and Newton-Stewart, raised this action to restrict the annuity of 3000*l.* per annum granted by the late Earl of Galloway over the said estates in favour of his widow, the late respondent (2), to an amount not exceeding one-third of the free yearly rent or value of the said estates, being the maximum limit of provision allowed to heirs of entail by 5 Geo. 4, c. 87, s. 1. (3) The question was whether, in fixing in virtue of the statute the free yearly rental or value

(1) (1902) 5 F. 48.

(2) The respondent is now dead.

(3) The material words are set out in the Lord Chancellor's opinion, p. 52, post.

of the estates upon which the amount of the annuity fell to be calculated, any deduction should be made from, inter alia, the gross rental of the annual expenses for "(1.) the upkeep and preservation of the estate, buildings, and fences, and (2.) in the management and superintendence of the estate." If these charges were not proper deductions within the 1st section of the 5 Geo. 4, c. 87, then the appellant admitted that the late respondent's annuity of 3000*l.* would not exceed one-third of the free rental of the estates.

The Second Division of the Court of Session (Lord Young dissenting) affirmed, on October 30, 1902, the interlocutor of the Lord Ordinary (Lord Pearson), by which he held that the appellant was not entitled to the deductions he claimed. (1)

1903. Nov. 24. *David Dundas, S.-G. for Scotland,* and *R. L. Blackburn* (of the Scottish bar), for the appellant. The Court of Session were wrong in the view they took that the expression "public burdens" in the statute must mean a charge on the lands.

The deductions claimed by the appellant were expenses which ought to be deducted, as they affected the yearly rents and were unavoidable, not only in order to maintain the subjects producing the rents, but also for the superintendence, management, and ingathering the rents themselves.

The statute provided for the deduction of the proper burdens affecting the lands, but it went on to say, "and the deduction of the yearly amount of other burdens of what nature soever affecting and burdening the lands," which includes the deductions claimed.

Further, if the word "free" in the section does not include the deductions claimed, the word might just as well be left out of the statute: see *Lord Belhaven and Stenton* (2); *Leith* v. *Leith.* (3)

Scott Dickson, L.A., and *Cullen* (of the Scottish Bar), appeared for the representative of the late respondent, but were not called upon.

(1) 5 F. 48. (2) (1896) 23 R. 423.
(3) (1862) 24 D. 1059.

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EARL OF HALSBURY L.C. My Lords, the question here at issue is a very narrow one. The language of the statute (1) is, I think, remarkable. The cardinal words are in the proviso: "Provided always, that such annuity shall not exceed one-third part of the free yearly rent of the said lands and estates where the same shall be let, or of the free yearly value thereof where the same shall not be let, after deducting the public burdens, life-rent provisions, the yearly interest of debts and provisions, including the interest of provisions to children hereinafter specified, and the yearly amount of other burdens of what nature soever affecting and burdening the said lands and estates, or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or value thereof to such heir of entail in possession, all as the same may happen to be at the death of the grantor."

My Lords, as I have said, I think the discussion lies within very narrow limits, and I am not disposed to extend those limits. I am very loth to get out of the actual language of the statute into what might be considered more reasonable provisions, if one were drawing the statute oneself. Such phrases as are here selected by the Legislature seem to me intentionally to exclude the deductions which are insisted upon. I do not mean to say that it is a conclusive argument against a construction of a statute that the Legislature might have used clearer words if they had intended such and such to be the construction; I am afraid one cannot always say that statutes are passed with such a degree of logical precision. But when you have the Legislature here selecting words which I think it cannot be denied are, in their ordinary acceptation, inappropriate to the deductions now claimed, and when the thing meant according to the construction contended for by the appellant was so obviously capable of being very readily expressed in simple language, such as "deducting all reasonable outgoings" or something of that sort, an argument may be drawn from the absence of such words, and the special emphasis which the statute appears to place on the word "burdens"—"the yearly amount of other

(1) The Aberdeen Act, 1824 (5 Geo. 4, c. 87), s. 1.

burdens of what nature soever affecting and burdening the said lands and estates." I cannot help thinking that language of that sort must have been used intentionally, and must have been used with the intention of excluding the very thing we are discussing. One need not go further into the inquiry when one has come to the conclusion that those words do not include the deductions claimed, but I can conceive that it may have been in the mind of the Legislature that to use such phrases as "reasonable outgoings and expenditure upon the estate" might introduce an amount of litigation on these questions which it was not desirable in the interests of the State should be promoted.

However that may be, my Lords, I only make that observation in passing to enforce what I consider to be the canon of construction of a statute. I am always disposed to read a statute very strictly. I must take the language as it is, and, taking it in the sense in which any lawyer, Scottish or English, reading those words would interpret them, I think these deductions would not fall within it. That really is the whole of my reasoning upon the subject. I am governed by the force of the language itself; I cannot go out of it; I do not desire to go out of it. What has been suggested, and very fairly suggested as a more reasonable statute to pass, is not a guide to the interpretation of this statute which is passed. I must, therefore, adhere to the language of the statute as it is, and under those circumstances I think your Lordships ought to affirm the judgment of the Court below and dismiss the appeal with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I do not see my way to differ from the judgment of the majority of the Court below. With regard to the argument of Mr. Blackburn, that according to the construction which they have placed upon the words of the statute the expression "free" is unnecessary, I think that possibly is so. I think the proviso would have had the same meaning if the word "free" had been left out; but, reading the whole of that section, it is pretty clear that the words which follow

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were intended to explain what was meant by "free rent" or "free value." I think the Legislature has carefully chosen those words so as to exclude these outgoings, which it would no doubt have been perfectly reasonable to have provided for; I think the framers of the statute, as the Lord Chancellor said, deliberately determined to exclude them.

LORD SHAND. My Lords, I am entirely of the same opinion.

LORD DAVEY. My Lords, I also am of the same opinion. I cannot myself get over the word "burdens"—"the yearly amount of other *burdens* of what nature soever affecting and" (not "or") "burdening the said lands and estates, or the yearly rents or proceeds thereof." I cannot say that these expenses are "burdens" which "burden the said estates" in any legitimate use of those words.

LORD ROBERTSON. I am also of opinion that the upkeep of the estate and its management and superintendence, are not, in the sense of the statute, "burdens affecting" either the estate or its rents. This is a statute relating to Scotland, and, in the legal phraseology applicable to Scottish landed estates, these expenses are not burdens, and do not affect the rents. They are simply contract debts. In Scottish legal language they would be properly described as expenses or outgoings; and the outgoings now in question figure so largely in the practical aspect of questions of jointure that it is impossible to suppose that if they were intended to be deducted the Legislature, not usually so parsimonious in language, would have veiled them under words, primarily at least, descriptive of entirely heterogeneous subjects. As for the appellant's other argument, I shall only say one word. The word "free" seems to me to do no more than describe the sum to be handled after deduction of the burdens which are enumerated in more or less comprehensive terms. The theory of the appellant involves that the statute describes as "free rents" rents from which there have not yet been deducted even

public burdens, which come first of all. This I think out of the question. H. L. (Sc.) 1903 GALLOWAY (EARL OF) v. GALLOWAY (DOWAGER COUNTESS OF).

LORD LINDLEY. My Lords, I am of the same opinion, and have nothing to add.

Appeal dismissed with costs.

Lords' Journals, Nov. 24, 1903.

Agents for appellant: *Grahames, Currey & Spens, for Russell & Dunlop, C.S., Edinburgh.*

Agents for respondent: *Nicholson, Patterson & Freeland, for Strathern & Blair, W.S., Edinburgh.*

[HOUSE OF LORDS.]

MACCULLOCH . . . . . APPELLANT; H. L. (Sc.) 1903 *Nov.* 24.

AND

ANDERSON AND ANOTHER . . . . . RESPONDENTS.

Trust—Will—Denuding—Vesting.

A testator directed that the income of his property (consisting of movable and real estate) be divided between his children; that in the event of any child dying leaving issue his or her share of income should be paid to the issue; and if a child left no issue the deceased child's share should be divided among the survivors; and he finally directed that "on the death of all" his children his estate should "be winded up and converted into money" . . . . and divided among the children of his sons and daughters per stirpes.

The testator was survived by four children—Andrew, who died unmarried, George, who died in 1880, survived by the appellant (who became of age in 1898), Mary, and Jane; the two latter were still alive and had families. The appellant claimed payment of one-third of the corpus of the testator's estate:—

Held, affirming the decision of the Second Division of the Court of Session, that the appellant was not entitled to immediate payment on the ground that the third of the income of the corpus was not by any means the same as the income of a severed portion of the estate; and it did not

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follow that if the estate was now divided that the remaining portion of the estate left undivided would represent in the future the present value.

Miller's Trustees v. *Miller*, (1890) 18 R. 301, and *Yuill's Trustees* v. *Thomson*, (1902) 4 F. 815, affirmed.

APPEAL against a decision of the Second Division of the Court of Session, Scotland (1), on a special case.

The respondents Anderson and others were the trustees acting under the will of James Macculloch, of Trees, Barrhead, Scotland, and the appellant Bertram D. Macculloch was the only child of George W. Macculloch, second son of the testator. The questions of law submitted in the special case were—(1.) whether the appellant was now entitled to payment of one-third of the residue of the movable estate of the testator; and (2.) whether the appellant is now entitled to (*a*) a conveyance of one-third of Spring Vale (part of the heritable estate of the testator), or (*b*) payment of one-third of the value of Spring Vale. The testator died in 1871. In his will he provided as follows:—

"(Thirteenth.) I hereby direct and appoint that on the death of my said wife, whereby the life-rent before provided for her shall cease, my said trustees shall hold my said means and estate other than the lands of Trees, and furniture, and Grahamston Cottage, for behoof of my said children in life-rent, and equally among them and their lawful issue in fee. And I direct that the said free income, after deducting all charges and expenses, shall be divided among and paid to my said children equally, share and share alike. . . . Declaring and specially providing that the whole of said income shall be an alimentary provision for the better aliment and support of my said children respectively, and that their several shares thereof shall not be assignable by them, nor arrestable, nor affectable by their respective debts or deeds or the diligence of their creditors, all which are hereby expressly secluded and debarred. (Fourteenth.) In the event of any of my said children dying leaving lawful issue, the share of the income of such deceaser shall belong to such issue, and shall be paid to them and applied for their aliment, support, and education; and in the

(1) (1900) 2 F. 749.

event of any of my children dying without leaving lawful issue, the share of my estate life-rent by such deceaser shall revert to and form part of the income for division among the survivors and the issue of any deceaser who shall have died leaving issue, who shall always succeed in the parent's place to the share to which the parent would have been entitled if in life. (Fifteenth.) In the event of the death of my eldest son Andrew Mair Macculloch without leaving lawful issue, my trustees are authorized and empowered to sell the said property of Trees to any of my said children who may wish to take it over at a valuation to be obtained by my trustees from persons of skill, the eldest having the first choice in preference to the younger; but if none of them elect to take it, then the same shall be sold, and the proceeds shall form part of the residue of my estate for division. (Sixteenth.) On the death of all my said children, I direct that my said estate shall be winded up, by the real or heritable portion thereof still remaining unsold being sold and converted into money, except the property of Trees, which shall be conveyed to the children of my eldest son, if he shall leave issue, and, after deducting all charges and expenses, the free proceeds shall along with my personal estate be divided among the children of my said sons and daughters who shall have left children per stirpes, that is, the family or children of each of them shall succeed in the parent's place to the share or proportion of capital which was life-rent by the parent and equally, share and share alike among themselves."

The trustees were also authorized by the seventeenth purpose of the will to sell at any time during the trust the whole or any part of the heritable estate not specially destined.

The testator's estate consisted of—(1.) a copyhold estate in England called Spring Vale (since converted into freehold); (2.) a property known as Trees, near Barrhead, Scotland; (3.) a cottage at Grahamston, Scotland; and (4.) movable estate amounting to about 40,000*l.*

The testator was survived by his wife, who died in 1878, and four children, namely, (1.) Andrew M. Macculloch, who died unmarried in 1878; (2.) George W., who died in 1880, survived

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by an only child, the appellant, who became of age in 1898; (3.) Mrs. Mary Elizabeth Brown; and (4.) Mrs. Jane Louisa Maclachlan. Both the latter are still alive and have families.

The Second Division of the Court of Session on March 14, 1900, answered both the above questions in the negative. (1)

1903. Nov. 23, 24. *David Dundas, S.-G. for Scotland,* and *J. Craigie* (of the Scottish Bar), for the appellant. The appellant is entitled to immediate payment. He is at present getting the interest of one-third of the estate. It is not disputed that the appellant has a vested right to one-third of the residue of the trust estate; and he submits that his share of the residue, so far, at all events, as it is movable, falls now to be made over to him, in accordance with the principle of law specifically laid down in *Miller's Trustees* v. *Miller* (2): see the opinion of the Lord President (Lord Inglis) (3), expressed to be the result of an examination of a long series of decisions. Still more recently the majority of thirteen judges in *Yuill's Trustees* v. *Thomson* (4) followed the decision in *Miller's Trustees* v. *Miller*. (2) In the case of *Yuill's Trustees* (4) Lord President Balfour, and Lords Adam, M'Laren, and Kinnear in their joint opinion, said: "The principle of *Miller's Trustees* (2) is that where a vested, unqualified and indefeasible right of fee is given to a beneficiary of full age, he is entitled to payment of the provision, notwithstanding any direction to the trustees to retain the capital of the provision, and to pay over the income periodically, or to apply the capital or income in some way for his benefit. The proposition is qualified, in the opinion of Lord President Inglis (i.e., in *Miller's Trustees* (3)), by the addition that, where there are trust purposes to be served which cannot be secured without the retention of the vested estates or interest of the beneficiary in the hands of the trustees, the rule cannot be applied, and the right of the beneficiary must be subordinated to the will of the testator. This is a necessary qualification, because there may be contingent liabilities, the amount of which cannot be precisely ascertained, and for which

(1) 2 F. 749.
(2) 18 R. 301
(3) 18 R. at p. 305.
(4) 4 F. 815.

it may be necessary to retain such a sum as the trustees judge to be sufficient." The appellant conceives that there is no trust purpose to be served by the retention of his share of the trust estate by the respondents.

The Court below proceeded on the sole authority of *Haldane's Trustees* v. *Haldane* (1); but that case clearly does not apply to this will. *Ballantyne's Trustees* v. *Kidd* (2) came very near this case, for there the beneficiaries that were major were paid out. *In re Nickels, Nickels* v. *Nickels* (3), lays down that trustees without any direct power may allocate any part of the estate to any one of the beneficiaries; and if the appellant gets that he is satisfied.

The appellant also founds on the Entail Amendment (Scotland) Act, 1868 (31 & 32 Vict. c. 84), s. 17. By that section, if a person fulfils the peculiar conditions, the Act converts the life-rent into a fee. The will here may be said to be a deed constituting a life interest.

H. Campbell, K.C. (with him *W. J. Cullen*), (all of the Scottish Bar), for the respondents, was called upon only on the point of the applicability of the Act of 1868.

The appellant is not a life-renter at all within the Act of 1868, s. 17. The only hypothesis of the appellant's case is that he is a fiar by gift of the testator, so he is entirely outside the Act; for if the section did apply, he could only turn his alleged life-rent into a fee.

The whole purpose of the Entail Act of 1868 was to free the life-renter from restrictions, and was not intended to interfere with the interests of other parties. Here there are other parties who would suffer prejudice if the appellant was allowed to take out his share. What remained might fall in value; and that given to the appellant might increase in value.

The costs below came out of the fund, but the appellant ought himself to pay the costs of this appeal, as he ought to have been content with the judgment of the Court below.

EARL OF HALSBURY L.C. My Lords, in this case I am wholly unable to see any reason why the judgment of the Court

(1) (1895) 23 R. 276. (2) (1898) 25 R. 621. (3) [1898] 1 Ch. 630.

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in Scotland should be disturbed. I speak simply of the construction of this will. I decline absolutely, as in many other cases, to enter into the question of what would be the construction of other wills under other circumstances even if the same words occurred in them. Here all the words seem to me to be intelligible only upon one hypothesis. The testator has intended that the estate should be kept together, and that until the period of distribution which he has himself ordained to be that which the will discloses, there should be the payment of the income to each of the persons entitled. It is enough to decide my view upon this matter that, in the events which might have occurred, the trustees would have paid so much that by so doing they would have withdrawn from the whole of the estate the power of giving their aliquot part to each of the persons entitled to it for the time being, so that when the period of distribution which the testator contemplated has ultimately arrived the distribution of the whole of the estate would not have been that which he determined and expressly directed by his will. To my mind that is enough, without reference to any authority, to establish the proposition that you must adhere to the words of the testator, because there are ulterior purposes to be served upon the arrival of the period of ultimate distribution.

My Lords, that is to my mind sufficient to answer the question in this case, and, therefore, I move your Lordships that this judgment be affirmed and this appeal be dismissed.

My Lords, I have not thought it necessary to go into the question of the statute, because, for the reasons which Mr. Campbell has given, it appears to me that the statute has nothing to do with this question: this is not one of the cases to which the statute applies.

With reference to the costs your Lordships are, I think, of opinion, and I accordingly so move, that inasmuch as this was a unanimous judgment, and under the circumstances which have been disclosed to the Court the parties might well have been contented with the judgment of the Court below, the costs of this appeal should follow the ordinary course—that is to say, the appellant must pay the costs that he has incurred

by the unnecessary litigation which he has promoted and maintained.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD SHAND. My Lords, I am of the same opinion. Notwithstanding the able argument of my friend the learned Solicitor-General, I am clearly of opinion that the judgment complained of is sound and should be affirmed. The case is one in which I think it is clear that there are ulterior purposes to be served, with reference to other beneficiaries, by the direction which the testator has given to wind up and sever and divide the estate *only on the death of all his children*. If the appellant's view were to receive effect, the surviving daughters of the testator might be prejudiced pecuniarily in their testamentary rights during their lifetime, and the grandchildren might be prejudiced in their right to receive their share of the estate ultimately.

LORD DAVEY. My Lords, I am of the same opinion. I think this case must be determined upon the construction of the words of this will. The gift on which the question turns forms the sixteenth purpose of the will; that has been read to your Lordships, and referred to by my noble and learned friend who has preceded me. I think it is clear that the testator intended that the estate should remain in globo till the event which he points out—namely, the death of all his children; and that in the meantime, and until then, the income of the whole of the estate should be divided in third shares, in the events which have happened, between the beneficiaries. My Lords, that appears to me to be a totally different form of will from one where the testator directs an immediate severance of the shares of his children, and trusts are declared of the severed aliquot portions of the estate. It seems to me also a different case from one in which the testator has given fixed amounts to some of the children and the residue to another or to others of the children, and where the estate remains in globo for the purpose of securing that those fixed sums shall be forthcoming when they are wanted.

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Lord Davey.

My Lords, I think the case of *Miller's Trustees* v. *Miller* (1), which has recently been confirmed in the Court of Session in the case of *Yuill's Trustees* v. *Thomson* (2), was decided upon a sound principle; but I do not think that that principle has anything to do with the present case. That principle is this: that where a man gives an estate in fee, he cannot fetter or restrict the fiar's enjoyment of it by any provision which is repugnant to the idea of an estate in fee. That has nothing whatever to do with fixing the period of time at which the testator may direct the share of the estate to be ascertained. If it is ascertained and given in a manner which confers a vested interest, the legatee is entitled to receive it, although the testator may purport to postpone the period of payment until he has attained the age of twenty-four or twenty-five, or some other time. But in the present case the difficulty of the Solicitor-General is this: that his client has no present right to receive the share of the estate, and that the share of the estate to which he is entitled cannot, according to the directions of the will, be ascertained until the death of the ladies.

My Lords, in the same way I do not think, with all deference to the Inner House, that the case of *Haldane's Trustees* v. *Haldane* (3) has anything to do with the present case either. I think that case was decided on a perfectly sound principle. There were three children, I think; the testator gave to one of them 18,000*l.*, and to two others 8000*l.*, and then divided the residue. There appears to have been some doubt whether the estate at the time of the distribution pointed out by the testator would be sufficient to provide all the legacies. Of course, one legatee would not be entitled to receive his legacy at once and leave possibly a deficient fund to provide the legacies for his sisters. The observations which are quoted in the appellant's case from the judgment of my noble and learned friend, who was then the President of the Court of Session, seem to me to explain what the decision really was in that case.

(1) 18 R. 301. (2) 4 F. 815.

(3) 23 R. 276.

Therefore, my Lords, I think on the words of this will the decision is perfectly right.

My Lords, with regard to the statute, Mr. Campbell has made it perfectly plain that the statute has nothing to do with this case. The statute apparently (I express no opinion upon what may be the construction of it) converts a person with a limited interest into one holding a larger interest, and says that the trustees, notwithstanding any directions to the contrary in the will, are to transfer his share to him; but it says nothing at all as to the time when it is to be transferred, nor is there anything in the statute which in the least degree overrides any apt and competent provisions in a will for the purpose of fixing the period.

LORD ROBERTSON. My Lords, I entirely agree.

LORD LINDLEY. So do I. As regards the costs, I do not know whether in Scotland any question will arise, and whether, if the appeal is simply dismissed with costs, the costs will come out of the estate. We do not intend that. As I understand the Lord Chancellor's view, the appellant is to pay the costs himself.

Appeal dismissed with costs.

Lords' Journals, November 24, 1903.

Agents for appellant: *Grahames, Currey & Spens, for Strathern & Blair, W.S., Edinburgh.*

Agent for respondents: *John Kennedy, W.S., for Bell & Bannerman, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1903 Dec. 7.

CLIPPENS OIL COMPANY, LIMITED. APPELLANTS;

AND

EDINBURGH AND DISTRICT WATER TRUSTEES . . . . . } RESPONDENTS.

Water—Right of Support for Water Pipe—Minerals under Pipe—Edinburgh Water Act, 1819 (59 *Geo.* 3, *c. cxvi.*)—*Edinburgh Water Company Act*, 1843 (6 *& 7 Vict. c. lxxxix*).

By the Edinburgh Water Act of 1819 (59 Geo. 3, c. cxvi.) the Edinburgh Water Company were empowered to lay pipes for conducting water to the city.

By s. 38 the company were authorized to take and use grounds and premises for the purpose of forming reservoirs, and to make the necessary cuts for conducting water to the city, and to lay the necessary pipes for that purpose, giving one month's notice of their intention to the owners and occupiers of such grounds and premises, and making satisfaction to such owners and occupiers in manner thereinafter directed.

In 1823 a strip of ground was opened by the company and a pipe laid, part of which passed through the lands of the appellants and their predecessors. The pipe was continuously used without question down to the commencement of this action in 1898, when it was threatened with injury by the appellants working certain minerals lying under the pipe. The company having raised an action for an interdict to restrain the appellants from working the minerals adjacent to the pipe so as to injure it, it did not appear that any payment or satisfaction had been made by the company in respect of laying the pipe:—

Held, affirming the decision of the First Division of the Court of Session, that after nearly eighty years' enjoyment of the way-leave it must be presumed that whatever was necessary to obtain the right to support for the pipe had been done.

London and North Western Ry. Co. v. *Evans*, [1893] 1 Ch. 16, approved.

APPEAL in an action for declarator against a decision by the First Division of the Court of Session, Scotland. (1)

By the Edinburgh Water Act, 1819 (59 Geo. 3, c. cxvi.) (2),

(1) (1900) 3 F. 156.

(2) Sect. 22 of the Act of 1819 enacted that the company should cause to be entered into books a full and true account of all money disbursed and payments made, and of all moneys that should be paid to or received by them respectively for or on account of the said company, and also a full and true account or minutes

the Edinburgh Water Company were empowered to lay a pipe, called the Crawley pipe, for bringing water from a spring

of every contract, bargain, and agreement entered into by the company.

Sect. 38: "And be it further enacted, that it shall and may be lawful to the said company, and they are hereby authorized and empowered, to take and use grounds and premises for the purpose of forming a reservoir or reservoirs within the parishes of Glencorse, Penicuik, and Currie aforesaid, in the county of Edinburgh, or any of them, at the places described in the map or plan hereinafter mentioned, or in reference to the compensation reservoir for the Crawley Spring and Glencorse Burn, at any other place or places within the said parishes of Glencorse and Penicuik which may be deemed more advisable by John Rennie and Thomas Telford, civil engineers, or either of them, provided that the consent in writing of the owners and occupiers of the lands whereon the same may be formed shall be previously obtained, to compensate the owners and occupiers of mills and landowners for the water taken for the purposes of this Act, as hereinafter directed, and to make the necessary cuts, trenches, mounds, or other works for connecting together the springs and water hereinbefore authorized to be taken, and also the necessary cuts, trenches, conduits, mounds, or other works for conducting the water thereof to the said city, in the line or lines pointed out in the said map or plan, and to construct the necessary aqueduct or aqueducts and lay the necessary pipe or pipes for that purpose, first giving one month's notice of such their intention to the owner or owners and occupier or occupiers of such grounds and premises, and making satisfaction to such owner or owners and occupier or occupiers in manner hereinafter directed, and the said company or their committee are authorized to obtain access to the grounds through which the water may be conducted by the gates or other mode of entry to the inclosures used as access for other purposes, at all reasonable times during the day, not earlier than six of the clock in the morning, nor later than sunset, to the said company or their committee, or their engineer or their superintendent specially named by the company, to inspect the line or track of the aqueduct or aqueducts, and in the event of repairs being found necessary to obtain the like access for the other servants of the said company to repair the same, the company indemnifying the owner or occupier for all damages thereby done in manner hereinafter directed."

Sect. 73: "Provided always, and be it enacted, that if any person or persons, bodies politic, corporate or collegiate, or owners or occupiers of any spring, brook, stream, grounds, houses, or other property required for the purposes of this Act specified in the schedule hereto annexed, seised or possessed of, interested in, or entitled to the same respectively, shall refuse to treat, contract, or agree to sell the same as aforesaid, or to allow the said company to enter upon, use, or take the same for the purposes of this Act, they shall be bound and obliged to state in writing the sum or sums which they demand as damage or recompense for the ground or other subjects taken or to be taken for the purposes of this Act. . . . "

The Edinburgh Water Company Act, 1843 (6 & 7 Vict. c. lxxxix.),

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into Edinburgh, and about 1823 a tract was opened and the pipe laid; a portion of the pipe passed through the lands of Pentland and Straiton, and water was thereafter brought continuously by the pipe to Edinburgh.

In making the cutting and laying the pipe it was necessary to open the ground for about 1083 yards from the point where the pipe entered the Pentland estate. The water company thereupon obtained a feu from the then proprietrix of Pentland estate of a strip 1083 yards long and above 25 yards broad. The feu disposition was dated 1825, and in an action raised in 1889 (1) it was decided that the respondents were proprietors of the said strip a cælo usque ad centrum, and that neither the proprietor of Pentland or his lessees were entitled to work minerals therein. In respect to this strip the respondents claimed they were entitled to adjacent support at common law. From the north end of the strip to the march between the estates of Pentland and Straiton, and for its whole course through Straiton, the pipe was laid below the surface of the ground. No disposition of the ground or of way-leave was granted by the owners of Pentland or Straiton for the land occupied by this section of the pipe. The evidence proved, however, that compensation was paid by the water company to the agricultural tenants, and that the then proprietrix of Pentland and the owners of Straiton were fully aware that the pipe was being laid.

In 1898 the respondents, the Edinburgh and District Water Trustees, who were vested in the right of the original Edinburgh Joint Stock Water Company, raised this action against

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s. 17, "enacted, that the directors shall have full power and authority, on behalf of the company, to contract for and purchase all such lands as may be necessary for the purposes of this Act, and, in so far as the same or any part of the lands heretofore acquired by the company under the powers of the hereinbefore recited Acts or any of them may not be required for such purposes, to dispose of the same or of any part thereof, and also to treat and agree with every person touching the compensation to be made for any damages to be done in the exercise of the powers given by this or the before recited Acts."

(1) November 22 and December 11, 1889. *Lockhart* v. *Edinburgh District Water Trustees*, May 21, 1888, held undistinguishable; and that there was no express or implied reservation of minerals.

the appellants, the Clippens Oil Company, who had come to be the lessees of the minerals in the estate of Pentland and proprietors of the adjoining estate of Straiton, including the minerals, and against the proprietor of Pentland, for declarator that the respondents were entitled to have their pipe in Pentland and Straiton supported so as to serve uninterruptedly as a conduct of water, and that the appellants were not entitled to work their minerals so as to endanger the said pipe.

The appellants contended that the respondents could only acquire the right they claimed by paying compensation for the minerals required to be left unworked under and in terms of the respondents' Act of 1843 (6 & 7 Vict. c. lxxxix.) and 1847 (10 & 11 Vict. c. ccii.), and the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17).

The First Division of the Court of Session on November 27, 1900 (1), recalled the interlocutor of the Lord Ordinary (Lord Pearson), and held that the appellants were not entitled to work the minerals adjacent to the said strip and adjacent to or under the pipe in such manner as to injure the said strip or the said pipe.

1903. July 27, 28. *A. Graham Murray, L.A.*, and *J. Avon Clyde, K.C.* (of the Scottish Bar), for the appellants. The Court below seem to have gone on the respondents' right to an easement without taking the land, but the words of the Act are "taking and using." Sect. 73 shews that ground is only to be taken, and that money is to be paid for it. The respondents cannot, in accordance with s. 22 of the Act, shew that compensation was paid in money. Further, there is not the slightest indication in the Act of 1819 that the Legislature intended to give anything in the nature of a servitude. The Act gives only the right to take ground and pay for it. Then the respondents' Act of 1843, s. 17, shews clearly that, if the respondents want support, they must give notice to take the land: see *London and North Western Ry. Co.* v. *Evans.* (2)

[They also cited the Water Company Act of 1754 (29 Geo. 2, c. lxxiv.) and 1784 (25 Geo. 3, c. xxviii.).]

(1) 3 F. 156.

(2) [1893] 1 Ch. 16.

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Asher, D.F., and *F. T. Cooper* (of the Scottish Bar), for the respondents. The appellants admit if the pipe was laid under statutory authority that it must remain. The construction put on s. 38 of the Act of 1819 by the Court below is the correct one. That section does not compel the respondents to purchase the land; and s. 73 supports that view. The owners of the land are entitled to all compensation due to them from the laying the pipe and its being there; but the argument of the appellants is that, not having taken the land, then the respondents have no right there. The later Act of 1843 does not interfere with previous rights. Sect. 17 simply gave the respondents power to improve their works. Very old water company statutes shew that way-leaves were sanctioned by the Legislature. The pipe was laid, with or without compensation, nearly eighty years ago, but, at all events, the evidence proved that it was laid with the consent of the proprietors, and after such a long lapse of time the inference is that it was there by right, and cannot be injured. The respondents submit that there was between the parties in 1823 a permanent agreement, and after the lapse of more than forty years a new purchaser cannot disturb that agreement: *Kelvinside Estate Co.* v. *Donaldson's Trustees.* (1)

J. Avon Clyde, K.C., in reply.

The House took time for consideration.

Dec. 7. EARL OF HALSBURY L.C. My Lords, in the year 1819 an Act of Parliament was passed to enable a certain water company to supply Edinburgh with water from a particular source. In the year 1823, just eighty years ago, a pipe was put through certain land for the purpose of effecting the purpose contemplated by the Act of Parliament. That pipe has continued to be used without hindrance down to the commencement of this dispute, and it has been threatened with injury by the working of certain mines belonging to the owners of the land through which the pipe passes. There can be no doubt that if the company or their predecessors in title complied

(1) (1879) 6 R. 995.

with the directions of the Act, their pipe is entitled to security, and they are entitled to have it protected against injury. But it is said that no compliance with the directions of the Act can be proved

I agree with those of your Lordships who think that an actual payment is not necessary, even if you have to assume that an actual payment was not made—that the words of the 38th section would be satisfied by the mere acquiescence of the landowner, even if he got nothing by it; but after eighty years' enjoyment I myself should presume whatever was necessary to make the maintenance of the pipe lawful.

To ask for particulars of proof after such a lapse of time, and to act as if it were open to make an objection that something has not been proved which might have been proved eighty years ago, if objection had been then raised, but which lapse of time has rendered impossible to be proved by living witnesses, would be to unsettle a most valuable principle of law. I might quote Napier L.C., who himself was quoting Lord Plunket, when he said: "But how stands the case at present? Witnesses have died; evidence has been lost; possession has been matured into a statutable title. I may here use the exquisite imagery of one of the greatest of my predecessors: 'Time, with the one hand mows down the muniments of our titles; with the other, he metes out the portions of duration, which render these muniments no longer necessary.' How much to be lamented if it were otherwise! If this preserving hand had not secured the new parliamentary title, what could compensate for the loss of witnesses, who could now testify?"

Lord Plunket was speaking of statutes of limitations, but every word applies in even a stronger degree to that principle of presumption in favour of long-continued use or possession, from which the presumption arises that such use or possession was lawful in its origin. Lord Herschell in *Philipps* v. *Halliday* (1) said, I believe with perfect accuracy, "that where there has been long-continued possession in assertion of a right, it is a well-settled principle of English law that the right should be presumed to have had a legal origin, if such a legal origin

(1) [1891] A. C. 228, 231.

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was possible, and that the Courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title": Pollock C.B. in *Gibson* v. *Doeg*. (1)

My Lords, I hardly understand, and I certainly cannot agree to any suggestion that a valid title, created in 1823, could be affected by anything in the statute passed twenty years afterwards. It appears to me that the judgment given by the Lord President deals satisfactorily with every question whether of fact or law.

I have no doubt that the decision of the Court was right, and I move your Lordships that the appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I agree in the judgment which has just been delivered by my noble and learned friend, and in the judgment about to be delivered by my noble and learned friend beside me (Lord Robertson), which I have had an opportunity of reading.

LORD ROBERTSON. My Lords, this case was very well argued for the appellants, but I am satisfied that the judgment appealed from is right.

The pipe in dispute was laid in 1823, and has ever since conducted water to the city of Edinburgh. It was laid as in virtue of an Act of Parliament passed in 1819 for the purpose of supplying Edinburgh with water. It seems to me that, unless the appellants are entitled to have the pipe removed, they are bound to give it support.

Now the 38th section of the Act of 1819 in clear terms authorizes the company to make the necessary trenches and lay the necessary pipes for conducting the water to the city. This enactment is side by side with, and independent of, the power to take grounds for another purpose, namely, forming reservoirs. The undertakers, in exercising the power now in question, namely, to cut trenches and lay pipes, are to first (1.) give notice, and (2.) make satisfaction. These conditions

(1) (1857) 2 H. & N. 615, 623.

(about notice and satisfaction) are directly and immediately applied to laying the pipes. The present case is, therefore, one where compensation is to be made for the rights acquired.

I pause to observe that, as expressed in the 38th section, the right given is the familiar one of way-leave—a right to lay and keep the pipe there. It is not preceded by or dependent on the formal acquisition in property of the land in which the pipe is laid.

Well, now, the pipe having been there for eighty years, what is to be said against its right to be there? Nothing at all, except that it cannot now be affirmatively proved that money was paid. But then the word in the 38th section is "satisfaction"; and s. 73 shews how satisfaction is to be made to owners who refuse to allow the company to use the ground. But this owner did in 1823 allow the company to enter, and it seems to me impossible in 1903 or 1898 to entertain the idea that he was not "satisfied" any more than that he had not had notice.

If, then, the pipe was duly laid by virtue of statutory authority, its legal position apart from the statute of 1843 (of which I shall presently speak) was that it had right to support. I rest this on the principle of *London and North Western Ry. Co.* v. *Evans.* (1)

While it is true that the enterprise of supplying this city with water was committed to a private company entitled to make profit within certain definite limits, the purpose was public. I am unable, however, to accept the suggested test as in any way conclusive of the question whether support or right to support exists. The true question is whether the grant made to this company under the compulsory powers of the statute, of the right to lay pipes, carried with it, by implication, the right to support. I find it impossible to hold that it did not. The question is the same as would have arisen in actual practice supposing that at the time when the pipe was laid this mineral field had been open. Would the owners have been compensated on the footing that they might, next day, bring down the pipe, or that they might not? Yet

(1) [1893] 1 Ch. 16.

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the right of the undertakers is just the same, whether the existence of the minerals was known or unknown, and whether the right of support was in fact paid for or not.

The appellants' separate argument on the Act of 1847 (if the views now stated are sound) is somewhat daring, for it involves this—that while from 1823 to 1847 the pipe in question had right to support (by virtue of the doctrine of Evans), it was deprived of that right in 1847. I am content to say that the reasoning of the learned judges in the Court of Session furnishes an adequate defence of the statute against this imputation.

I have only to add that, like the learned judges, I reject the respondents' alternative theory of common law servitude. Their rights are derived from the Act of 1819 alone.

Appeal dismissed with costs.

Agent for appellants: *John Kennedy, W.S., for J. Gordon Mason, S.S.C., Edinburgh.*

Agents for respondents: *A. & W. Beveridge, for Millar, Robson & M'Lean, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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AND

WALLACE-JAMES . . . . . RESPONDENT. *Dec.* 18.

Scottish Law—Burgh Property—Immemorial Use by Inhabitants of Ground for Recreation—Encroachment—Concurrent Judgments.

There is no law or settled practice of this House to prevent it from differing even from two concurrent judgments of fact, and this House cannot decline the duty of formally expressing its own judgment.

Observations of Lord Herschell L.C. in *Owners of the "P. Caland" and Freight* v. *Glamorgan Steamship Co.*, [1893] A. C. 207, 215, and in *McIntyre Brothers* v. *McGavin*, [1893] A. C. 268, 275, explained.

In Scottish law at least forty years' use by the inhabitants must be proved in order to establish a right of recreation by immemorial user, and the evidence to establish the right must be of the same character and as strong as in the case of prescription—that is, it must shew that the right claimed has been enjoyed nec vi nec clam nec precario.

The respondent, an individual burgess of a burgh, raised an action for interdict against the appellants and other persons encroaching on a strip of ground consisting of a few yards in length and breadth, situated on the edge of a river, on the plea that the ground in question had from time immemorial been dedicated by the magistrates of the burgh to the use of the burgesses and inhabitants for the purpose of recreation and amusement, and the bleaching and drying of clothes. The magistrates, who were made parties, lodged a minute that the operations complained of were not a disadvantage to the burgh:—

Held, reversing the decision of the Lord Ordinary and the First Division of the Court of Session, Scotland, that the ground in question had not from time immemorial—that is, for a period of forty years—been dedicated or appropriated by the magistrates to the uses nor the purposes of recreation.

APPEAL from a judgment of the First Division of the Court of Session, Scotland, which affirmed the decision of the Lord Ordinary. (1)

The respondent, J. G. Wallace-James, raised this action against the appellants, Montgomerie & Co., for interdict.

The facts are sufficiently set out and the arguments discussed in the judgment of the Lords, especially in that of Lord Davey.

(1) (1899) 2 F. 107; (1902) 4 F. 771.

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1903. Nov. 16, 17, 19, 20, and 23. *J. Avon Clyde, K.C.*, and *A. H. B. Constable* (with them *W. F. Trotter*), (all of the Scottish Bar), for the appellants. The judgment of the First Division and that of the Lord Ordinary were erroneous. The appellants maintained that the piece of ground in question was a part of the alveus of the river. The appellants purchased a mill dating from 1557, and attached to the mill was a mill-dam. They found it necessary to clear out the dam, and in doing so, with the consent of the magistrates, they removed the piece of ground. The appellants do not raise in this House the right to maintain the action; in fact, the only question now intended to be argued is whether the piece of ground, which is a very small strip, has been from time immemorial dedicated to the public use for public recreation, playing games, bleaching, and drying clothes. In Scotland, open, uninterrupted, continuous use inconsistent with toleration or any position than that of public right for the prescriptive period must be proved; but the evidence here clearly shews that the alleged uses could not have existed for forty years prior to the raising of this action in 1898. In fact, there were no imaginable acts of possession until 1866. What the respondent seeks to do here is to roll into one the two periods between 1853 and 1898, whereas the Acts between 1853 and 1866 were inconsistent with the suggested dedication to the public, for the magistrates are proved to have let the ground for a rent. *Grahame* v. *Magistrates of Kirkcaldy* (1), *Sanderson* v. *Lees* (2) and *Murray* v. *Magistrates of Forfar* (3), explain what is the nature of the claim in question.

Scott-Dickson, L.A., and *John Wilson, K.C.* (with them *A. J. Lawrie*), (all of the Scottish Bar), for the respondent. The judgment under appeal ought to be affirmed. The case, which turns on questions of fact, has been decided by the Lord Ordinary (who saw and heard the witnesses) in the respondent's favour; and that judgment has been affirmed by the First Division. The respondent, therefore, holds concurrent judgments in his favour: see Lord Herschell L.C. in *Owners of the*

(1) (1879) 6 R. 1066, 1071; (1882) 7 App. Cas. 547, 559.

(2) (1859) 22 D. 24, 27, 30.

(3) (1893) 20 R. 908.

"P. Caland" and Freight v. *Glamorgan Steamship Co.* (1), and *McIntyre Brothers* v. *McGavin* (2), and Lord Chelmsford in *Gray* v. *Turnbull.* (3)

[EARL OF HALSBURY L.C. I have repeatedly protested against the views cited. I feel that where a tribunal has to review a question of fact, it must do it to the best of its ability.]

The above cases go to shew that if this House thought the concurrent judgments wrong, but not entirely erroneous, it ought to affirm them: Lords Chelmsford, Herschell, and Watson stated this as a principle. Moreover, the judgments of the Lord Ordinary and of the Inner House were warranted by the evidence.

[They commented on the above-cited cases and *Paterson* v. *Magistrates of St. Andrews* (4), *Sinclair* v. *Magistrates of Dysart* (5), *Home* v. *Young* (6), and *Dyce* v. *Hay* (7)]

J. Avon Clyde, K.C., in reply.

The House took time for consideration.

Dec. 18. EARL OF HALSBURY L.C. My Lords, I think this appeal should be allowed. It is simply a question of fact, and doubtless, where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an Appellate Court.

In this case, though, as I have said, it is simply a question of fact, I do not think it is necessary to discredit a single

(1) [1893] A. C. 207, 215.
(2) [1893] A. C. 268, 275.
(3) (1870) L. R. 2 H. L., Sc. 53.
(4) (1880) 7 R. 712; (1881) 6 App. Cas. 833.
(5) (1779) Mor. Dict. 14519; (1780) 2 Pat. App. 554.
(6) (1846) 9 D. 286.
(7) (1849) 11 D. 1266; (1852) 1 Macq. 305, 311.

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witness in the sense of imputing to him wilful untruth. There are some differences between the two sets of witnesses, though I think not very many upon any questions which depend on the personal recollection of the witnesses. There are very great differences sometimes in the opinions which the witnesses express—opinions which I think they never ought to have been allowed to express; but I give credit to the honest desire of all the witnesses to give an accurate view of the thing as they themselves saw it. But while I say that, I think what they saw and truthfully depose to falls very far short of what is sought to be proved by their testimony on behalf of the complainer, namely, that the spot in dispute was dedicated to public use by the town authorities. The nature of the place, its history, and indeed I think the use made of it, are to my mind inconsistent with such an inference as is sought to be derived from what the different witnesses deposed to. The greater part of the evidence on both sides does in my mind point to something inconsistent with a dedication to public use, whether for recreation or for general user.

The argument suggests various reasons why this inconsistent user may be, under the circumstance, not inconsistent with the right claimed; but a proof that something proved may be consistent with the complainer's claim is not reasonable evidence of the affirmation which the person asserting the right is bound to establish. The history, nature, and surroundings of the spot in dispute ought to be regarded in respect of this head of inquiry. I think the conclusion is adverse to the complainer's claim. The ground in dispute is a narrow strip along the side of a river and abutting on a dam, varying in width at different times, and subject to such variations as must have made it incapable of either pleasant or profitable occupation from time to time—certainly for the necessary period of forty years never treated by the town authorities as anything but a derelict piece of land, some parts of it relinquished to dirty uses, and some parts appropriated for payment to uses inconsistent with the general user for recreation. In so far as it was made profitable to the town authorities, the public of Haddington were prevented from

having any power of using it for any purpose whatever; the whole matter presents an absolutely absurd hypothesis when recreation is talked of as being proved by schoolboys playing on it. Then the user suggested was for bleaching or washing; but payments made to the town in respect of the user are not consistent with, or, at all events, not evidence of, a user by the public such as the complainer was bound to make out.

The argument upon this part of the case assumed this form: There have been cases where there has been proof of interruption to the public user as great as was created here by the action of the public authorities in receiving payment for lime stances and washing, thereby excluding the public from parts of the place in dispute, and yet the Courts have held that the public character of the ground may consist with such interruption. I think the argument overstates the effect of any decision cited to us; but even if not overstated, it proves nothing, since in the cases cited it was proved or admitted that the public right was assumed to exist, and the question was whether the alleged interruptions were lawful or could have existed together with a public user. Here, however, the question is the existence of the public right at all. I do not at all disagree from what is said by Lord Adam when he says that "it is not necessary to prove that the ground has been used for any particular purpose such as the bleaching of clothes or for any particular form of recreation such as golf or football. All acts of the inhabitants shewing that they had the free use and enjoyment of the ground are relevant to support the complainer's case." But, to use his Lordship's words, they must be such uses as do shew that they had the free use and enjoyment of the ground; and that is what in this case they do not shew.

The history of this case and the form in which the litigation began is not without its importance. The idea that this spot could be treated as public ground dedicated to public user and recreation seems to have taken its rise from an observation of Lord Stormonth-Darling to the effect that, if the proceedings before him had alleged that there was an interference with a public park or the like, the complainer might have had a right

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to sue; but he alleged nothing of the kind, but simply that it belonged in property to the burgh. Thereupon the question now in debate was raised. I cannot think that if any one had thought it was a place for recreation or public use the question would not have been raised at first.

In this view I cannot think that due weight has been given to the history of the piece of ground in question as disclosed in the minutes of the burgh and in relation to the complaints of the people on the east side of what was causing the flooding of their premises, nor to the proof of what had been the levels discovered when the works were undertaken; and to the minutes also in relation to the bowling green, and to the correspondence as to the baths and washhouses; and I think I see why. The whole question was mixed up with the issue as to the proprietary rights of the burgh in such a manner that the issue as to public use and enjoyment seems to have dropped out of sight.

If the question now before your Lordships had been kept exclusively in view as it has been before us, I think it must have been observed how slender was the evidence of any public enjoyment, and the user such as it was did not reach forty years at all.

My Lords, I do not think it necessary to go through the evidence in detail. I answer the question of fact by saying that the complainer has to my mind wholly failed to make out the public user for forty years, and I move that the judgment be reversed.

LORD SHAND. My Lords, I am also of opinion that this appeal should be sustained, and the action dismissed with costs.

It is with great reluctance that I think, as your Lordships do, that an appeal should be sustained against concurrent judgments by the Lord Ordinary and the Division of the Court on a question which is entirely a question of fact.

The Lord Advocate for the respondent, as might be expected, pressed strongly on the House that the judgment under appeal should be affirmed, because the case, which turns on fact, has

been decided by the Lord Ordinary, who saw the witnesses and himself heard their evidence, and his judgment has been sustained by the unanimous opinions of the learned judges of the Division on appeal. No one is disposed to give greater importance to such circumstances than I am; but the very special facts of the case, as proved, to which I have given the utmost attention, seem to me clearly to shew (1.) a complete failure on the part of the complainer to establish the alleged immemorial possession for forty years on which the case depends; and (2.) that important facts in the evidence as to the character of the alleged public uses have been overlooked or disregarded in the matters to which I shall immediately refer, and that these uses are quite insufficient to establish the rights claimed, or any of them, to which effect has been given by the judgments complained of.

I have not thought it necessary to deal with the argument whether the title to the ground in question in the magistrates is such as to support the view that they held the ground for dedication to public purposes of amusement or use by the inhabitants only, because I think there is really no evidence to support that view. And on that point I shall only say I adopt the judgment about to be delivered by my noble and learned friend Lord Robertson.

The real issue in the case has been, whether the ground in question has from time immemorial—that is, for the period of forty years from the month of July, 1858—been dedicated or appropriated by the magistrates of the burgh to the use of the burgesses and inhabitants for the purposes of recreation and amusement, and the bleaching and drying of clothes. If it has been proved to have been so used, the result would be that the burgesses are entitled, in a question with the magistrates, to have these uses continued as a matter of right.

Unfortunately, instead of having the proof taken continuously, or nearly so, at one time it was extended over a long and broken period, beginning on May 16 and resumed November 7, 1900, and again resumed in March and May, 1901, at different times—a circumstance which made it difficult to deal with, in forming a judgment on its merits.

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The first important fact, to which I think due weight has not been given, is the nature of the ground in question, and its situation, which renders the case one of a very peculiar and special nature. The ground is extremely small in extent, consisting of a strip of a few yards in length and breadth of vacant ground on the edge of the river, and lying opposite to an inclosed bowling green, which has been always occupied by an association or club.

The small extent and position of the ground suggests that it was more likely to be waste and neglected than to be suitable or useful as a subject for special appropriation to the public for purposes of amusement or in the bleaching or drying of clothes; and its character, at least after 1866, was what I should describe as a waste and derelict small patch of vacant land which has to some extent been recovered from the channel of the river and was originally sand and gravel.

Again, this ground was occupied during several of the years prior to 1866, which are required to make up immemorial possession at the commencement of the alleged period, in a manner which is inconsistent with the notion of the appropriation or dedication suggested. The burgh from 1857 to 1866 let the ground in return for rent to persons engaged in making lime for stances to be used for that purpose. The return from four or five different tenants amounted annually to 4*l.* or 5*l.* for these stances, let from 2*l.* to 10*s.* each stance, and thus for eight years of the period necessary to establish time immemorial the ground was occupied by this inconsistent use. It is true that there were some very small patches left open on the river side, but these could scarcely afford grounds for either amusement or use of bleaching in so far as employed in this way. The use of these patches, so trifling in character, was really a casual use of neglected or waste ground, which neither the magistrates nor any one else could notice, or would have taken any interest to put a stop to.

Again, in regard to the use of the ground for the purpose of games and amusements, the lime stances were inconsistent with this, and such a use as occurred was not of a nature sufficient to create a right. It was merely such use by boys

in the neighbourhood of their schools as boys will take on any vacant place to which they can have convenient access, and was entirely restricted so long as the stances existed.

With the removal of these in 1866 there was some further use of the same kind for playing and for walking exercise, but nothing occurred of such a use as systematic golf and cricket, or games of that class, and no such constant and persistent uses as to indicate appropriation where that has been held to have taken place in previous cases.

In regard to the drying and bleaching of clothes, even at the time after the stances were removed, the use of the ground seems to have been made to much the greater extent after the erection of the washhouses by the persons who paid and used for that accommodation. Any use beyond that was trifling in kind, and was not, I think, taken or thought of as a matter of right, or as given or allowed by the burgh as an appropriation to the public.

In these circumstances, I am of opinion that the complainer has failed to prove (1.) possession from time immemorial; and (2.) having in view the position and nature of the piece of ground in question, that the partial uses which took place are to be regarded as having occurred on ground waste and neglected, and in that sense derelict in character, and not as uses of a right to ground dedicated or appropriated to the public for any of the purposes alleged by the complainer. In these circumstances I am clearly of opinion that this appeal should be sustained.

LORD DAVEY. My Lords, the issue in this case is whether a piece of ground, not exceeding an acre in extent, situate on the west bank of the river Tyne, and extending from a point a few yards above Nungate Bridge in the burgh of Haddington to a point some yards below the bridge, has from time immemorial been reserved and appropriated to the use and enjoyment of the burgesses and inhabitants of the burgh. This is a question of fact, and the burden of proof was, in the first instance, on the complainer, the present respondent. It is agreed that, according to the practice of the Scottish Courts,

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at least forty years' user by the public must be proved in order to establish a claim of right by immemorial user. It is not a question of prescription, for there is no dominant tenement; but by analogy, I presume, to the law of prescription, the period of forty years has been adopted as the minimum of proof in such a case. I think the evidence required to establish a case of immemorial user must be of the same character and as strong as would be required in a case of prescription. It must shew that the right claimed has been enjoyed nec vi nec clam nec precario.

Before I address myself to a consideration of the evidence in the case before your Lordships, I desire to make one observation of a general character. It was pressed upon your Lordships by the learned counsel for the respondent that this House would not disturb the concurrent findings on a question of fact by two Courts below; and reference was made to what was said by noble and learned Lords in the case of *Gray* v. *Turnbull* (1), the case of the *Owners of the P. Caland and Freight* v. *Glamorgan Steamship Co.* (2), and *McIntyre Brothers* v. *McGavin* (3) in the same volume. But, my Lords, when those observations are carefully read, it will be found that they do not lay down any rule of practice (such as is followed by the Judicial Committee in Indian appeals at any rate) that this House will not entertain an appeal on a question of fact where there have been concurrent findings in the Courts below. In the case of the *Owners of the P. Caland and Freight* v. *Glamorgan Steamship Co.* (2), for example, Lord Herschell is reported as saying: "Now I quite agree with what has been said in this House in previous cases as to the importance of not disturbing a mere finding of fact in which both the Courts below have concurred. I think such a step ought only to be taken when it can be clearly demonstrated that the finding was erroneous. In the present case, although I might probably myself have come to a different conclusion, I cannot say that any cardinal fact was disregarded or unduly estimated by the Courts below. I can lay hold of nothing as

(1) L. R. 2 H. L., Sc. 53. (2) [1893] A. C. 207, 215.
(3) [1893] A. C. 268, 275.

turning the balance decisively the one way rather than the other. I think the decision of the question of fact at issue depends upon which way the balance of probability inclines, and I am not prepared to advise your Lordships that it so unequivocally inclines in the opposite direction to that indicated in the judgments of the Courts below, that this House would be justified in reversing the judgment appealed from."

My Lords, I do not disagree with what was thus stated, if it be regarded merely as a guide to the judgment of the tribunal and not as a rule of law or practice. In all cases your Lordships should and would pay the greatest respect to the concurrent findings on a question of fact of two Courts. When the question depends on the credibility of witnesses the opinion of the judge who heard the evidence would in most cases be conclusive. In every case the appellant assumes the burden of shewing that the judgment appealed from is wrong, and when it depends on an estimate of probabilities or inferences so nicely balanced that it is impossible to say that a decision either way would be wrong, every material fact having received due consideration, your Lordships would, I make no doubt, be disposed to affirm the concurrent decision of the Courts below. Some noble and learned Lords have lamented that an appeal lies to this House on questions of fact; but so long as that is the law, I think that this House cannot decline the duty of forming and expressing its own judgment after taking into account all the considerations to which I have referred.

My Lords, in the present case I have the misfortune to differ from the opinion of both the Lord Ordinary and the Inner House, and I believe that all your Lordships have come to the same conclusion. I think the learned judges did not give sufficient weight to some circumstances which, in my opinion, are of material import, and attached too much weight to evidence of user which seems to me of a very precarious description. I assume that all the witnesses intended to speak the truth, and believed themselves to be doing so, but some allowance must be made for a natural exaggeration and lapse of memory as to events which happened more than forty years ago.

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My Lords, I think that the fair result of the evidence is that the piece of land in dispute has, to some extent at any rate, been formed by accretion to the river bank during the last century, and that water formerly flowed through the western arch of Nungate Bridge more continuously and in greater volume than it did before the alteration which is complained of in this action. That this is so is demonstrable as regards the piece of land adjoining on the north to and lower down the river than the piece of ground in dispute, because it was found in the course of the appellants' recent operations that the western end of the weir for a considerable distance was covered up in soil which had formed over it. And the configuration of the ground shewn on the map and model leads to the inference that a large portion of what was, until the recent alterations, dry land to the south of the weir must have been formed in the same manner and at the same time. This conclusion is to some extent confirmed by the two old maps of 1819 and 1820, though they cannot be depended upon for exact accuracy of scale, and by the petition or representation made by the inhabitants of Nungate in 1831, complaining of their houses being flooded by what they described as the "encroachments" or "embankments" on the opposite side of the river, which they said were increasing. The evidence of Kellacher (Printed Papers, p. 24, G) and other witnesses as to the building of the sewage tank to the south of Nungate Bridge about thirty or forty years ago supports the same conclusion as regards that portion of the land in dispute. The inference which I draw from the evidence is that the piece of land in dispute was formerly at most a narrow strip on the bank of the river, and of very little (if any) practical importance.

I now turn to the history of this piece or strip of land. It appears that in the year 1749 a lease of the bowling green was made by the town council for a term of 114 years. The subject demised is, "All and haill that piece of waste ground belonging to the said community and now made into a bowling green by Robert Thomson"; and it is described as bounded by the bridge on the south, by the water of Tyne on the east, and by the Clarty Burn on the north. It follows that either the

land in dispute north of the bridge was not in existence at that date, in which case it is a subsequent accretion to the demised subjects, or, if and so far as it was in existence as dry land, it was comprised in the tack of 1749. It does not appear at what date the land in dispute first became, or was treated as, a separate subject outside the lease of the bowling green—probably about 1822, when the east wall of the bowling green is said to have been built. The lease of the bowling green has been renewed, and it has been and is now in the occupation of private persons. The piece of ground to the east of the present bowling green was let to and occupied by persons for the purpose of lime stances from at least 1857 until the year 1866, and the town council received rent for it. It was then ordered by the town council to be turfed and put into proper order. It is quite true that when there is independent evidence of immemorial user by the public an encroachment by the town council on the public right will not be a defence to an assertion of such right. But when the question is as to the sufficiency of the proof to sustain the right, it appears to me to be a fact of capital importance that the town council has without objection for a long period, commencing more than forty years ago, and extending to a time within forty years before the commencement of the action, dealt with the land in a manner inconsistent with the right claimed.

The proof of public user which is relied on in substance consists of evidence of schoolboys playing on the ground and of bleaching clothes. I have read the evidence very carefully, and do not propose to discuss it at any length. There is only very slight evidence of the boys playing any definite games on the ground, and the evidence appears to me to shew nothing more than that boys used to run over and amuse themselves about the ground as boys will in any vacant space. And this, it must be observed, went on while the land was let for lime stances. It appears to me quite a misnomer to call this strip of ground the town playground, as the Lord Advocate suggested. The only witness who speaks to bleaching clothes on the ground more than forty years ago is, I think, Peter Taylor, who speaks of it only in general terms. The town bleaching ground was in fields higher up the river, called the East and West

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Haughs, and the piece of ground in dispute had only rare tufts of grass on it, and was not suited for bleaching. After the washhouse was built and the piece of ground had been turfed in 1866 poles were put up, and it was then used by women using the washhouse for bleaching. Altogether the user proved earlier than 1858 appears to me of a too casual and precarious character to prove a dedication to public uses.

But then it was said that this piece of land was part of a larger tract described in a deed of 1765 as "the commonty of the said burgh called the Sands." What is now called the Sands is a triangular piece of vacant ground to the west of the bowling green and separated from it by the road. The bowling green itself is not described as part of the Sands in the tack of 1749; and there is no evidence that the piece of ground in dispute was ever called the Sands. What is relied on is a description of what is now called Elm House in the deed of 1765 as bounded by "the Mylds Burn and the commonty of the said burgh called the Sands and the Skinners Knowe and the tenement of the heirs of Mr. James Lauder on the south and north." If the map is looked at it will be found that the southern boundary of the Elm House property is of an irregular line, and part of it abuts on the road and the present Sands at the south-western corner, and the true southern boundary of the other part is the burn.

The description does not prove that either the bowling green or the ground between the bowling green and the river was ever called the Sands. The "Sands" probably in former times included a larger area than the piece of ground which is now called by that name; but in my opinion the suggestion made by Lord Adam, and adopted by the Lord Advocate, that the ground in dispute was part of the Sands, is based on nothing more than conjecture.

I am of opinion that the respondent has failed to sustain the issue tendered by him, and I agree that the appeal should be allowed.

LORD ROBERTSON. My Lords, I am clearly of opinion that the appeal should be allowed.

The question which alone is before the House was a good

deal confused in the Court of Session by a collateral issue, namely, the now abandoned claim of property; and also by a large amount of incompetent evidence, taken down, without challenge or check, in response to leading questions and invitations to witnesses to express their opinions on points in the case. Accordingly, I am the less surprised that amid such distractions the attention of the Court has not been applied with concentration to some questions in the case which are crucial.

What I regard as the initial error in the judgment of the First Division lies in its accepting without hesitation, and certainly without discussion, the respondent's theory that the ground in dispute was part of an ancient common ground called the commonty of Sands. As their Lordships have said that this is clearly proved, and as I know the habitual accuracy of the learned judge who delivered the judgment, I have carefully searched for the evidence of this statement, and I can only say that I have discovered none. The ground in dispute is in no title or record ever called or spoken of as part of the Sands, nor does any document yield or suggest the inference that it was so in fact. Even the parcel of ground next to that in dispute, namely, the bowling green, is not called in any title, or proved to have been, part of the Sands. An existing piece of open ground is still called the Sands, and is so marked on the Ordnance Survey Plan, and it is sometimes referred to in the evidence for the respondent as the Sands in contradistinction to the ground in dispute. It is true that a portion of another piece of ground, Lady Kitty's Garden, seems from the title to have been part of the Sands, and doubtless it is true that in Haddington, as in other burghs, alienations have been made of such common ground. But it would be quite illegitimate to accept without evidence the independent proposition that this particular ground, not contiguous either to the existing Sands or to Lady Kitty's Garden, was also part of the Sands.

The importance of this question of title and its influence on the Court's consideration of the rest of the case are apparent. If you start with the assumption that this is part of an ancient

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recreation ground, you will, rightly, be less exacting about evidence that this original state of things has continued. You will also account for commercial use and exclusive private rights by calling them encroachments. But if there be no such basis, then it is incumbent on the pursuer of the issue to prove immemorial use and enjoyment by the inhabitants. Applying this to the present case, it was necessary for the respondent to prove that for forty years before he raised his action in 1898 this ground had been, as he averred, reserved and appropriated to the use and enjoyment of the inhabitants for the purposes specified on record. Forty years is the necessary period—not that this is a question of prescription, but because a state of facts must exist continuously for at least forty years before the inference can be drawn of immemorial use. Now, even on a very general survey of the facts, the year 1866, which is only thirty-two years before 1898, stands out as distinguishing sharply the period before it from the period after it, for it was in that year that for the first time the town council laid out the ground in grass. Prior to 1866 there was no semblance of any act of dedication to popular uses on the part of the authorities, and, on the contrary, a considerable part of the ground was let for exclusive use for lime stances. Yet this crucial date is not adverted to in the judgment of the First Division. In short, the case was not treated as one where there was any difficulty about the period of possession, or any need for distinguishing between the period before and the period after 1866, in order to make out the requisite period of forty years. The learned judges, starting with the theory of an ancient title, have not subjected the case to the test of working backwards from the date of the action.

The same assumption as to the history of this ground as part of the Sands has led to their Lordships giving but a very scanty description of what seems really a very important feature in the case—the physical nature of the ground. On a broad view of the situation, and also when the evidence has been examined, this ground is simply part of the flood channel of the Tyne. It lies vis-à-vis to the westmost arch of Nungate Bridge. Through that arch the river flowed in times of flood,

although the arch and the ground in question were, in the usual state of things, dry. What the place was like before 1866 may be gathered from what is said by the respondent's witness, Peffers: "there was a tuft of grass here and there"; but as to the substance of the ground we are left in no doubt, for this same witness carried out the operations in 1866, and "the stuff that came out was sand and gravel." And what was found by the persons who carried out the operation now complained of substantially confirms these statements.

Again, as regards the conformation of the ground, we are told (also by a witness for the respondent) that it was subject to change from the action of the river: "Sometimes it was highest at the wall, sloping gradually down towards the river, and sometimes it was not. The water sometimes made a difference on it. I have seen it sometimes exactly level, and I have seen it sloped a little way" (Watt, Printed Papers, p. 83, C). When those physical facts are borne in mind, it is the more easy to understand the title of the bowling green (which unquestionably has on its immediate east the ground in question) when the title bluntly asserts that its eastern boundary is "the water of Tyne." Those facts are also entirely in harmony with the representations made in the earlier half of the last century, and considered by the town council, that the main part of the Tyne used, even in the beginning of last century, to flow more to the west of the river, and that the western part of the channel had since then been allowed to get filled up.

Related to this last is the question of the size of the area available for popular uses before 1866. On this it is not easy, nor is it necessary, to be precise. But in any possible view the space available was of the most exiguous. A substantial part of the ground was occupied by lime stances, and the space intervening between these and the river was, as already seen, subject to fluctuation. The witness who seems to have been most constantly there, of all examined, was Charles Cumming, who worked from 1851 to 1854 at the lime stances, and he says that people could hardly get their carts driven past the lime stances unless they went into the bed of the river.

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There is clear evidence that the ground, in addition to its natural disabilities, was uncared for and dirty—not so dirty as the ground below the Clarty Burn, but dirty.

Out of these unpromising materials the respondent has dressed up a case, in studied imitation of *Grahame* v. *Magistrates of Kirkcaldy* (1) and the rest of that well-known chapter of law. I do not intend to examine its shortcomings in much detail, because I have already pointed out the vital difference I have with the Court in the initial stages of the case. Once the case is unmasked, once the ground is seen to be historically not part of an old common recreation ground, but part of the flood channel of the river, the burden of proof is duly ascertained. Has the respondent proved possession from 1858 downwards? The fatal answer is, that whatever may be said of the period beginning in 1866 with the laying out of the ground in grass, he has, in substance, no case at all for the eight years from 1858 to 1866, which may be called the period of the lime stances.

I have the less hesitation in saying this, because we have nothing to shew that the Court of Session would think otherwise if they had specifically examined the evidence about those eight years.

What the respondent has is a good deal of evidence of boys playing—the games being running games—a very little quoit playing, and a certain amount of bleaching. Of more general forms of recreation, of pleasure walking, there is virtually none, and the conditions do not make this surprising.

Now, of schoolboys, one of the respondent's own witnesses (Stevenson) has compendiously observed, "boys go anywhere"; they seem to have frequented the lime stances as well as the place clear of lime stances, and the wynds near the school, and the ground on the other side of the river; the "recognised" playground (Stevenson, 49) being all the while not any of these places, but the Sands, i.e., the triangular piece of ground beside the school.

As to bleaching, the respondent's witness Davie definitely confines the bleaching to the period after 1866: "They could

(1) 7 App. Cas. 547.

not do it when the lime stances were there" (62, C). "I have seen bleaching on the ground between the washing-house and the river at different periods off and on during the last thirty years, but not prior to that" (63, E). The just inference to be drawn from this testimony is not that those witnesses speak untruly who say that they did bleach or did see bleaching before 1866, but that this ground was not habitually used for that purpose. In the same relation I may observe that the value of what the Lord Ordinary calls negative evidence must not be underrated. There is a substantial body of evidence from Haddington townsmen of credit, knowing this ground perfectly well, and its size, nature, and uses, during the period in question, and they scout the idea of it being in fact a place of recreation and bleaching.

The evidence has to be considered as applied to vacant ground, part of the town's property, but with no historical or overt dedication to popular uses, and the evidence of use during the forty years from 1858 being all that there is to prove the rights now asserted. In my view the evidence for the respondent of itself fails to make out such a claim; and when the whole evidence is considered, the contention of the appellants is satisfactorily established. For a case of this sort, it will not do to shew merely that a piece of town land was unused for commercial purposes, and was resorted to by the classes who frequent vacant spaces. In a genuine case of the class into which this case is sought to be intruded, there is sure to be, or to have been, some congruity between the nature of the ground and those purposes of which recreation is the leading one, and something to shew that it was not merely the worthlessness of the subject that accounts for the abstention of the authorities from disposing of it for the pecuniary advantage of the town. Otherwise the ideas of reservation and appropriation, expressed in the respondent's averment on which this question turns, never arise. In my view of the facts, those ideas are entirely excluded from the present case.

LORD LINDLEY (read by Lord Davey). My Lords, I also have carefully examined the evidence in order to see if it

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justified the inference that there had been forty years' user as of right of the piece of land in question by the public, as alleged by the respondent. I have come to the conclusion that the evidence falls far short of what is necessary to establish any such user. I entirely concur in thinking that there is no law or settled practice of this House to prevent it from differing even from two concurrent findings of fact if, on a careful consideration of the evidence, this House comes to the conclusion that those findings are wrong. In this particular case the evidence relating to the structure of the bridge, the ice-worn appearance of the third arch, and the natural soil near it and beneath it, all convince me that in early times that arch was over the bed of the river, although it may have been more or less dry in the summer when the water was low. I infer from the evidence that by the deposit of sand and gravel, and some softer soil brought down by the river, its bed near and under the arch gradually rose and became more and more dry and firm enough to bear brick rubbish and other material carted upon it. The use made of the piece of land in question, when it became of any use at all, appears to me to be quite inconsistent with any dedication of it to the public for recreative purposes, as contended by the respondent. It was worth nobody's while to object to such use as was made of it by boys and persons who dried clothes on it when they could, but any use of small portions of it for such purposes for forty years as of right is not only not proved but is, in my opinion, clearly disproved by the clear and frequent acts of ownership of the rest of it which are placed beyond dispute.

The appeal ought, in my opinion, to be allowed with costs in the usual way.

Lawrie, for the respondent. As to costs. The respondent was put to great expenses in both Courts below upon the question of title—the title to sue and the title to the ground—and an enormous mass of evidence was brought forward to prove the appellants' title to the ground in dispute—a title they disowned in this House. Therefore each party ought to pay their own costs below.

EARL OF HALSBURY L.C. They did not disown it; they said they would not press it because they had sufficient ground for their contention without touching that question.

LORD SHAND. It would be very difficult to separate the expenses; and, in substance, the question was fought on possession.

Lawrie. Yes, quite so. My suggestion would have been that each party pay their own costs below——

EARL OF HALSBURY L.C. I do not think we can allow it to be argued any more; we have expressed our view.

Ordered that the interlocutors appealed from be reversed, and that the respondent do pay to the appellants their costs both here and in the Courts below.

Lords' Journals, December 18, 1903.

Agent for appellants: *John Kennedy, W.S., for T. S. Paterson, W.S., Edinburgh.*

Agents for respondent: *A. & W. Beveridge, for Patrick & James, S.S.C., Edinburgh.*

[PRIVY COUNCIL.]

J. C.* 1903 July 27, 28; Nov. 3.

TRUST AND LOAN COMPANY OF CANADA . . . . . } APPELLANTS;

AND

GAUTHIER AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Civil Code of Lower Canada, art. 1301—*Construction—Wife's Mortgage of Separate Property for her Husband's Benefit void—Onus probandi as to Husband's Benefit.*

By the true construction of art. 1301 of the Civil Code of Lower Canada a wife's mortgage of her separate property is void both as to the debt contracted and as to the disposition if it is in any way for her husband's purposes. Ignorance on the part of the lender that the money was borrowed for the husband's purposes is of no avail, and the burden is on him to prove that it was not so borrowed.

APPEAL from a decree of the above Court (Oct. 25, 1902) affirming a decree of the Superior Court of the Province of Quebec (March 5, 1902), and dismissing appellants' suit with costs.

The appellants sued the respondent Gauthier and the respondents Hermine Labrice de Kerouack et Vir, claiming that certain property hypothecated by the respondent Hermine by deed dated March 11, 1897, to secure repayment of the sum of $4000 with interest, should be surrendered judicially, to the end that the same might be sold in due course of law, and the proceeds thereof be paid over to the appellants in satisfaction of debt, interest, and costs, unless the respondent Gauthier (to whom the hypothecated property had been sold) paid to the plaintiffs the sum claimed, with interest and costs.

Gauthier did not appear; but the other respondents pleaded that the said sum of $4000 was (as the plaintiffs well knew)

* *Present:* LORD DAVEY, LORD JAMES OF HEREFORD, LORD LINDLEY, and SIR ARTHUR WILSON.

advanced to the husband of the said Hermine for the purpose of paying his debts, that the said Hermine had received no benefit from the same, and that, as she was separated as to property from her husband, the said deed was void and contrary to the provisions of art. 1301 of the Civil Code of Lower Canada, which is as follows :—

" A wife cannot bind herself either with or for her husband otherwise than as being common as to property; any such obligation contracted by her in any other quality is void and of no effect." (1)

The Superior Court found that the wife had executed the deed of March 11, 1897, and obtained the loan for her husband's benefit, and that under art. 1301 of the Code the deed was void.

In the Appellate Court Wurtele J. delivered the judgment of the majority :—

" A wife is under the ban of the law ; when she seeks to effect a loan she is incapable of contracting, and binding herself when it is shewn that the money borrowed was neither wanted nor used for her own individual requirements. The law is prohibitory, and is one of public policy, and therefore whether the lender was in good or in bad faith in the transaction is immaterial; all that is required to obtain the annulment of a wife's contract of loan is proof that the money was neither required nor used for her individual purposes, and was given to her husband. It has, however, been urged that the acknowledgment contained in the contract of loan that the money was received by the wife throws upon her the obligation of shewing how the money was expended; that it is not sufficient to shew that the money had been handed over to the husband, but that the husband had really used the money for his own purposes. This, however, is not the rule; it is sufficient to shew that the money had been given to her husband, and was not used for her. It has also been urged that a declaration made by the

(1) The French text, to which the judgment refers, is as follows: " La femme ne peut s'obliger avec ou pour son mari, qu'en qualité de commune; toute obligation qu'elle contracte ainsi en autre qualité est nulle et sans effet."—F. P.

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wife of the purpose for which the loan is required obliges her to shew that the husband has used the borrowed money for his purposes. If this were the rule the law would be fallacious, because the husband or the lender could always obtain such a declaration; but the rule laid down by art. 1003, C.C., in the case of a minor who makes a declaration as to his age, should apply in the case of a wife who when effecting a loan makes a declaration as to its purpose. Such a declaration cannot affect the recourse nor the nature of the proof which she has to make. The law does not require that the party from whom a wife obtains a loan should know that it is for the benefit and use of her husband, as otherwise the law would be illusory. The law prohibits, and is one of public policy, and the party who is about to make a loan to a wife is placed on his guard. It is for him to use proper caution, and to see to the due employment of the loaned money for the purposes of the wife. If he does not do so, and is subjected to a loss, he has in face of the law only himself to blame."

Bossé and Blanchet JJ., on the contrary, were of opinion that as the loan had been made to the wife at the request of her husband, who was acting as her general agent, and as it was stated in her presence to be for the improvement of the property, which had been according to the evidence materially improved since 1897, the deed was primâ facie valid, and the burthen was on her to establish that the money had been used for her husband's private purposes, and that she had failed to do this.

Haldane, K.C., *Kavanagh, K.C.*, and *Loehnis*, for the appellants, contended that these decrees were wrong. They referred to articles of the Code, 176, 177, 178, 179, specifying art. 177 as the one on which they mainly relied; also to arts. 1208, 1210, 1211 as to the effect of a notarial instrument; and also to arts. 1265, 1234, 1030, 2061, 2016, and the Civil Procedure Code, arts. 235, 225, and 226. The adverse article was 1301. In reference to this they contended that on its true construction it avoided only those obligations of the wife whereby she purported or intended to bind herself for her husband. Here the

respondent did not by her deed bind herself for her husband. To avoid the deed she should have proved that the appellants knew that she was binding herself for her husband, if that were the true fact of the case. No evidence to that effect had been given or to shew to whom the moneys advanced had been paid, and that they had been expended for the husband's benefit and not in any way for her own. Reference was made to *Mailhiot* v. *Brunelle* (1); *La Banque d'Hochelaga* v. *Jodoin*. (2)

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Bisaillon, K.C., for the respondents, was not heard.

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The judgment of their Lordships was delivered by

LORD LINDLEY. The question raised by this appeal is whether a security given by a married woman on her separate property is valid or void under art. 1301 of the Civil Code of Lower Canada.

The respondent Dame Hermine Labrice de Kerouack is the wife of M. Corriveau, but she is entitled to separate property. Such property consists of land in the town and district of Iberville. M. and Madame Corriveau, although duly separated as to property, lived together, and he managed her property. Considerable sums of money had been laid out upon it before 1897, and in particular some stables and a billiard room had been built. Part of the land had been laid out in lots for building purposes.

In February, 1897, M. Corriveau applied to the plaintiffs for a loan of $4000 on this property. The application was made in the name of his wife and was signed by him for his wife. The plaintiffs allege, and they called witnesses to prove, that M. Corriveau stated that the money was wanted for improvements on the property. He denies that he made any such statement, and his wife denies that she wanted money for any such purpose. She says she borrowed the money to enable him to pay his debts, and never understood that it was borrowed for any other purpose. She understands English very imperfectly, and never heard it stated that the money was wanted for improvements.

On March 11, 1897, M. and Madame Corriveau went to a

(1) (1870) 15 L. C. J. 197. (2) [1895] A. C. 612.

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notary's office, and she then executed a formal mortgage (hypothec) of her property for $4000 advanced to her. This mortgage was in proper form: it was made before a notary and was duly signed and attested. It was made by Madame with the authority of her husband, and he signed it as required by s. 177 of the Code. It was also duly registered. The $4000 were paid to Madame Corriveau by the plaintiffs by a cheque drawn on the Bank of Montreal and made payable to her order. The cheque was given to her; she indorsed it and gave it to her husband, who paid it into the Bank of Quebec to the credit of his account there, and he drew upon this account by cheques signed by himself in the ordinary way. Madame Corriveau had no banking account herself, and it is plain that, although she had the cheque, she did not have the money or the benefit of it, unless she got it afterwards from her husband, of which there is no proof.

The loan was entered in the plaintiffs' books as a loan to her. As interest on it became due she was regularly debited in these books with it; and she was credited in them with payment of the interest. But the interest was, in fact, paid by her husband by his own cheques, and receipts made out to her were sent to him by the plaintiffs. She never saw these books or entries. She left all her business matters to her husband.

Attempts were made by the plaintiffs to shew that the loan was really for the wife, and that the money lent was laid out on her property. But all these attempts failed. M. Corriveau's evidence was objected to as inadmissible; but their Lordships are of opinion that the learned judge of first instance did not do wrong in admitting it under art. 314 of the Code of Civil Procedure, and they accept it as admissible for what it is worth. But M. Corriveau cannot be regarded as a trustworthy witness, and his wife is clearly interested in defeating the plaintiffs. But, without relying on M. Corriveau's evidence, the entries in his pass-book appear to their Lordships as very significant. The $4000 appear to his credit in the books of the Quebec Bank on March 13, 1897; on the same day he drew out $2000, and on March 16 he drew out another $2000. On this same March 16 he is credited in another bank, the

Merchants' Bank of Halifax, with $2000, and he drew this out by degrees during the month. By the end of March the whole of this money had disappeared. He said it went to pay his debts, but he produced no cheques, receipts, or other documents to corroborate his statement. Madame Corriveau, in answer to a question from the Court, said that all improvements on her property, made before she signed the mortgage, had been paid for, and that money was not wanted for them. But she admitted that her property had increased in value since the date of the mortgage, and she could give no satisfactory explanation of this increase. That the property was attended to and kept in decent order, and to some extent cleared from stones by persons employed by M. Corriveau, seems to their Lordships established by the evidence; and possibly some of the money borrowed may have been spent in this way upon the property. But the amount, if any, so spent cannot be ascertained; and it appears to their Lordships that it cannot have been large enough to be worth considering. On this head the evidence of Mr. Ryder, the valuer, is important. He says the improvements were complete when he valued the property.

The case came, in the first instance, before Doherty J., who came to the conclusion that the mortgage was given by Madame Corriveau for the benefit of her husband, and he declared the mortgage invalid accordingly. From this decision the plaintiffs appealed to the Court of King's Bench. The members of that Court, by a majority of three to two, agreed with Doherty J., and dismissed the appeal. The two dissentient judges did not believe M. Corriveau's evidence nor that of his wife, and were of opinion that the mortgage deed and receipt by Madame Corriveau of the cheque for the amount borrowed were enough to establish the plaintiffs' case in the absence of satisfactory proof that she did not in fact get the benefit of the money.

From this decision the plaintiffs have appealed to His Majesty in Council; and their Lordships have now to determine the inferences to be drawn from the evidence and the legal effect of such inferences.

The law applicable to the case is contained in art. 1301 of

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the Civil Code of Lower Canada, which in English runs thus: "A wife cannot bind herself either with or for her husband otherwise than as being common as to property; any such obligation contracted by her in any other quality is void and of no effect."

The expression "in any other quality" is explained by turning to the French text of the Code, where the words "otherwise than as being common as to property" appear as "qu'en qualité de commune." There is no question here as to common property. The property dealt with was the wife's separate property, and this she can dispose of with the concurrence of her husband: see art. 177 of the Code. But after marriage neither husband nor wife can dispose of their respective properties for the benefit of the other except in a few specified cases which may be disregarded on the present occasion: see art. 1265.

The language of art. 1301 renders it necessary to distinguish between obligations of a wife for her husband and other obligations contracted by her. The object of the article is evidently to protect her against her husband and against herself. Except in dealing with their common property, she is not to bind herself with him, i.e., she is not to join him in any obligation which affects him. But she clearly does not infringe art. 1301 by simply disposing of her own property with his concurrence under art. 177. If this is done for her own benefit, the disposition is good. If, however, she disposes of it for her husband, she immediately falls within art. 1301. (1) What then is meant by "for him"? Does it mean jointly with him, or as his surety and nothing more? or does it mean for him generally, i.e., in any way for his benefit? Again, is the knowledge, or rather want of knowledge, of her obligee (créancier) important? If a person deals with her bonâ fide and without knowing that she is binding herself for her husband, is her obligation nevertheless null and void, if it turns out to have been for her husband in fact? Must a person lending money to a married woman on her separate property run the risk of losing his money, unless he takes care to ascertain that it is

(1) 6 Mignault, 186, 190; 1 Sharp, 578.

not borrowed for her husband? The answers to be given to these and other questions all depend on the true meaning and legal effect of art. 1301, and on the meaning to be attributed to the expression "for her husband."

Their Lordships are not surprised to find that art. 1301 has given rise to much difference of judicial opinion. It is not necessary to comment on the numerous decisions on this article. They cannot all be reconciled with each other. But their Lordships gather from the decisions referred to in the argument and in the published commentaries (1) on the Code Civil that the words "for her husband" are now judicially held to mean generally in any way for his purposes as distinguished from those of his wife; and that ignorance on the part of her obligee (créancier) cannot avail him if it is proved that she in fact bound herself for her husband. These conclusions are in their Lordships' opinion sound and in accordance with the language of art. 1301 and with its evident object.

It is seldom necessary to consider on whom the burden of proof lies when the evidence is complete, but it appears to their Lordships that art. 1301 would have little or no effect in practice if the burden was on the wife to prove that she was acting for her husband. The modern decisions in Canada shew (and their Lordships think correctly) that the lender must prove that she was acting, not for her husband's benefit, but for herself. (2) If this is proved, the subsequent application by her of money she may have borrowed will not invalidate the security she may have given for it. But if, as soon as she gets the money, she gives it to her husband, or applies it for his benefit, it is difficult to come to the conclusion that she in truth borrowed it for herself.

Art. 1301 clearly goes further than the law which prevailed in Lower Canada before the Code was framed; but their Lordships cannot accede to the argument that the language used and deliberately adopted in the Code must be narrowed and held to have no greater effect than the previous law for which it has been substituted.

The law then being as above stated, and the facts being as

(1) 6 Mignault, 189, 191. (2) 6 Mignault, 191.

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already set forth, their Lordships are unable to differ from the decision appealed from. Taking the whole of the evidence, their Lordships cannot avoid coming to the conclusion that the security in question was in fact given by Madame Corriveau for her husband, although the plaintiffs did not know it. Such being the case, the security is void.

Mr. Haldane contended that so long as the notarial act was not set aside upon an improbation, evidence to contradict it was inadmissible; and he referred to arts. 1208, 1210, and 1211 of the Code in support of this contention. But the notarial act in this case does not say for whom the money was borrowed; it merely says that the money was lent, paid, and advanced to the wife, which was perfectly true. The effect of a notarial act has been much discussed in Lower Canada: see *Cossette* v. *Vinet* (1); and although it seems settled that a notarial act is conclusive proof that the facts stated in it were stated to the notary and were accepted by him to be true, it does not appear settled that the truth of those facts cannot be controverted except in an improbation proceeding. However this may be, and assuming that the notarial act in this case should be accepted as complete proof of what is stated in it, their Lordships do not think it follows that it should be accepted as complete proof of anything else; and they decline to accept it as complete proof of what might be naturally inferred from it if no further evidence were forthcoming.

Another point raised by Mr. Haldane was that, assuming art. 1301 to apply, it only affected the debt contracted by Madame Corriveau and not the disposition of her property, and he contended that the plaintiffs could at all events hold the property hypothecated by her until they were repaid their advance with interest. If their Lordships were dealing with an English mortgage which the mortgagor could not get back from his mortgagee without the assistance of a Court of Equity, this contention would deserve attention. But the Canadian law of hypothec is totally different from the English law of mortgage, and if there is no debt there is no hypothec: see

(1) R. J. Q. 7 Q. B. 512.

art. 2017. Moreover, art. 1301 avoids the whole obligation, and this word covers the hypothecation.

Their Lordships will, therefore, humbly advise His Majesty to dismiss this appeal, and the appellants must pay the costs of it.

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Solicitors for appellants: *Wilde, Moore & Wigston.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

GRAND HOTEL COMPANY OF CALEDONIA SPRINGS, LIMITED . . . } PLAINTIFFS;

AND

WILSON AND OTHERS . . . . . DEFENDANTS.

J. C.* 1903 *July* 21, 29; *Nov.* 4.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Trade-mark—"Caledonia Waters"—No exclusive Right to the Trade Word of Local Source.

Where the mineral waters of the appellant derived from various Caledonia Springs, so called from being in a township of that name, acquired in the market the name of "Caledonia Water"; and the respondents having discovered other springs in the same township sold their goods as "from new springs at Caledonia":—

Held, in an action for an injunction, that the appellants had not, in the circumstances, a right to the exclusive use of the word "Caledonia." The respondents were entitled to indicate the local source of their waters, and had sufficiently distinguished their goods from those of the appellants.

APPEAL from a decree of the above Court (Dec. 4, 1902) reversing a decree of Boyd C. (June 18, 1901).

The judgment was pronounced in two actions which were consolidated by order of the Court, and were brought by the appellants, who owned certain mineral springs in the township of Caledonia, for an injunction to restrain the respondents (defendants) or any of them from infringing the appellants' trade-marks, and from infringing the exclusive right which

* *Present:* LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

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they claimed to use the word "Caledonia" in various expressions relating to mineral waters. The respondents occupied the following positions: Lyall, McDonell and Trenholme were in partnership to sell certain mineral waters derived from certain land in the same township; McDougall was employed under them to distribute such water; the two Wilsons and Tune & Son had each the exclusive right to purchase and sell such water in certain districts of the province of Ontario.

The appellants insisted that in relation to mineral water from the Caledonia Springs, the property of the appellants, the word "Caledonia" had been used in the phrase "Caledonia Water," and in other phrases designating the said water exclusively for upwards of sixty years, had lost its geographical sense and had acquired a secondary meaning by which the waters from their Caledonia Springs only were designated; that they had by their energy and expenditure made a large market for the said waters from the Caledonia Springs under the name "Caledonia Water," and that the respondents were taking advantage of that market to sell other waters by use of the word "Caledonia"; that the respondents had infringed the plaintiffs' right at common law in respect of the word Caledonia, and had infringed also appellants' registered trade-marks, and claimed an injunction against the respondents.

In their defences the respondents did not admit the facts narrated by the appellants, and alleged that there are in the township of Caledonia a number of sulphur, saline, and other mineral springs well known for medicinal properties of some of which the respondents Lyall, Trenholme & McDonell were owners; that these springs are in the immediate vicinity of an unincorporated village called Caledonia or Caledonia Springs; that the respondents Lyall, Trenholme & McDonell have established a business at the said springs for the sale of the said mineral water; that in order to distinguish the water of the respondents from that of the appellants from the Caledonia Springs, the respondents represented and sold their water as from "New Springs at Caledonia" and with the same object represented it to be "Beaver Brand"; that the respondents Lyall, Trenholme & McDonell had authorized the

respondents Wilson and J. Tune & Son to use the said words in connection with mineral waters sold to them by the last named respondents. They accordingly contested the validity and infringement of the appellants' registered trade-marks.

The trial judge declared the appellants' exclusive right at common law to the use of the trade words "Caledonia Water" and "Water from Caledonia Springs," and granted an injunction restraining the use by the respondents of these words and the words "Water from the New Springs at Caledonia" and "Caledonia."

This judgment was reversed in appeal.

Arnoldi, K.C., for the appellants, contended that the judgment of the First Court should be restored. The evidence did not shew any ground for the use of the word "Caledonia" as applicable to the respondents' waters. It shewed that the Caledonia Springs on the appellants' property are the only source of Caledonia water, and that they are under the appellants' exclusive control. The name "Caledonia Springs" being that of the appellants' four springs only, and the waters therefrom being alone "Caledonia water," the respondents were not justified in affixing those names to the waters from their two springs, which moreover did not possess the same medicinal and other characteristics. The word Caledonia has lost its signification as a name of locality, and has in relation to mineral waters acquired a secondary signification as solely designating the waters of the appellants' Caledonia Springs. Their own agent admitted that if they did not use the word it would be very detrimental to the sale of their water: see for a parallel to this the evidence in *Reddaway* v. *Benham*. (1) The use of the word by them was untrue, and calculated to deceive both immediate and ultimate purchasers into the belief that they were obtaining the appellants' water. Reference was made to *Montgomery* v. *Thompson* (2); *McAndrew* v. *Bassett* (3); *Seixo* v. *Provezende* (4); *Radde* v. *Norman* (5); *Massam* v. *Thorley's*

(1) [1896] A. C. 199, 212.
(2) [1891] A. C. 217.
(3) (1864) 4 D. J. & S. 380.
(4) (1865) L. R. 1 Ch. 192.
(5) (1872) L. R. 14 Eq. 348.

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Cattle Food Co. (1); *Wotherspoon* v. *Currie* (2); *Powell* v. *Birmingham Vinegar Co.* (3); *Braham* v. *Beachim.* (4)

Scrutton, K.C., and *R. C. Smith, K.C.*, for the respondents, contended that the water from their springs being a natural product of the soil, they were entitled to call it by the geographical name of its place of origin. In doing so they had been careful to distinguish their waters from the appellants' by their labels. The "Beaver Brand" was easily distinguishable from the "Magi Brand" and the "New Springs" from the "Original Springs." The appellants had not made out any exclusive right of user in the word "Caledonia" either alone or in combination with other words as a designation of mineral waters. The respondents had an equal right to the use of the word in designating or describing mineral waters derived from their new springs at the place mentioned. They clearly distinguished their waters from the appellants' waters by their labels and descriptions; and provided that were the case, they had as much right as the appellants to indicate the source and the locality from which their waters were derived. They referred to *Cellular Clothing Co.* v. *Maxton* (5); *Whitstable Oyster Co.* v. *Hayling Fisheries, Ld.* (6); *Braham* v. *Beachim* (4); *Canal Co.* v. *Clark* (7); *Montgomerie* v. *Donald & Co.* (8); *Montgomery* v. *Thompson* (9); *McAndrew* v. *Bassett.* (10)

Arnoldi, K.C., replied.

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The judgment of their Lordships was delivered by

LORD DAVEY. The appellants are the proprietors of certain lands in the township of Caledonia, Prescott County, Ontario. There are on this land three natural springs of mineral waters containing chemical properties which render them serviceable as table waters and for medicinal purposes. The springs are

(1) (1880) 14 Ch. D. 748.
(2) (1872) L. R. 5 H. L. 508, 517.
(3) [1896] 2 Ch. 54; [1897] A. C. 710.
(4) (1878) 7 Ch. D. 848.
(5) [1899] A. C. 326.
(6) (1901) 18 Rep. Pat. Cas. 434.
(7) (1871) 13 Wallace, 311.
(8) (1884) 11 R. 506.
(9) [1891] A. C. 217.
(10) 4 D. J. & S. 380; S.C. 10 Jur. (N.S.) 550.

in close proximity to each other, but differ widely in their character. One of these springs is known as the Gas Spring from the quantity of carburetted hydrogen gas which it evolves, another is called the Saline Spring, while the third is known as the White Sulphur Spring. Owing to the presence of these springs the site has for many years past acquired a great reputation as a place of summer resort. The appellants own a large hotel called the Caledonia Springs Hotel, and in the course of time other buildings have been erected which the learned Chancellor of Ontario in his judgment describes as "The Caledonia Springs Village attached to the hotel," and there are a Caledonia Springs post-office and a Caledonia Springs railway station. The springs are called the Caledonia Springs, and the locality itself has also acquired the name of Caledonia Springs, very much like Tunbridge Wells, although in this case there is nothing which could properly be described as a town, and no incorporated village.

There is a fourth spring situate about two miles from the other springs, called the "Intermittent" or "Duncan" Spring, belonging, not to the appellants, but to a gentleman named King Arnoldi. The appellants on December 27, 1899, acquired from Mr. Arnoldi the right to take water from the Duncan Spring and to use his registered trade-marks for a period of two years, and also for ever to use in connection with the water of the Duncan Spring the words "Magi Caledonia Springs," registered by them. The appellants thus include this spring also in the expression "Caledonia Springs."

The appellants use the water from their springs for the purpose of supplying the visitors at their hotel, and also supply it in barrels to their agents and others in Ontario and Quebec, who bottle it for the purpose of sale to the public. And they have registered as trade-marks certain labels for use on the bottles. The appellants' waters and (it may be assumed) Mr. Arnoldi's waters also have acquired in the market the name of "Caledonia Water."

The respondent McDougall was also until recently the proprietor of an hotel at Caledonia Springs known as the Queen's Hotel. The respondent McDonell was the owner

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of land immediately adjoining the land of the appellants. McDougall, having some difficulty with the appellants as to the supply of their water for the visitors at his hotel, in the year 1898 commenced boring on the land of McDonell, who was his brother-in-law, and at the depth of 85 feet a spring of saline water was tapped, and a further boring made a short distance from the first struck a subterranean spring of sulphur water at a depth of 165 feet. Both springs have a continuous natural flow which rises up the pipes laid in the borings. These borings are situate about a quarter of a mile from the appellants' three springs, and the analysis of the water obtained from them shews a general resemblance to the waters from the appellants' springs. On August 1, 1898, McDonell entered into a partnership agreement with the respondents Lyall and Trenholme for placing on the market the waters from the borings thus made on his land. Arrangements were then made with the respondents Wilson for sale of the waters as agents for the partners at Toronto, and with the respondents J. Tune & Son for their sale at London (Ontario).

On February 5, 1901, the appellants commenced two actions against the respondents Wilson and against the respondents J. Tune & Son. The other respondents were afterwards added as defendants in each action. The two actions were consolidated, and were heard by the Chancellor of Ontario on June 11, 1901, and judgment was delivered on the 18th of the same month.

The plaintiffs in the action claimed an exclusive right to the use of the word "Caledonia" in the phrases (amongst others) "Caledonia Water," "Caledonia Seltzer," "Mineral Water from Caledonia Springs," and "From New Springs at Caledonia," and the words "Natural Saline Water" and "Natural Seltzer," and prayed an injunction to restrain the defendants from infringing the plaintiffs' trade-marks and also from selling the water as Caledonia Water, or under any name, trade-mark, or designation, using the word "Caledonia" as descriptive of the same or to indicate the source of the water.

The learned Chancellor held that the respondents J. Tune & Son had infringed the appellants' trade-mark, and the Court

of Appeal agreed in that finding, and continued the injunction granted against those respondents. There is no appeal as to this matter, and it seems to their Lordships clearly right. It is fair, however, to the principal respondents to say that the obnoxious labels were adopted without any direction from them, and when they were made aware of the use of the labels they expressed their disapproval and said they could not undertake to defend it. As regards the labels used by the respondents Wilson, the Chancellor held that the defendants had not infringed the appellants' trade-marks, but as to the trade names "Caledonia Water" and "Water from Caledonia Springs," the case of the plaintiffs was established, and he granted an injunction accordingly.

The respondents appealed, and their appeal was heard ultimately before Moss C.J. and Maclennan and Osler JJ. The Chief Justice agreed with the Chancellor, but thought that the terms of the injunction should be varied in one respect. The two other learned judges dissented (except as to the injunction against J. Tune & Son), and the reasons for their judgment were given by Maclennan J. The appeal was accordingly allowed, and by an order of December 4, 1902, the actions, save in respect of the injunction against the respondents J. Tune & Son, were dismissed with costs. Hence this appeal.

The learned counsel for the appellants did not lay much stress upon the alleged infringement of the trade-marks except as regards the use of the word "Caledonia," and in their Lordships' opinion quite rightly. On this point, which is one of fact, their Lordships agree with the concurrent findings of the two Courts below. Nor do their Lordships think there is anything in the make-up of the respondents' goods to which the appellants can reasonably object. A more difficult question is as to the use of the word "Caledonia" as a trade name or as part of the description of the respondents' waters. It must be conceded that the respondents cannot use the word in such a manner as to pass off their goods for those of the appellants. But if they have not done so, they ought not to be restrained by injunction from the use of the word.

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The first fact to be noted is that the goods in question are not a manufactured article, or, in other words, the name which it is sought to protect is not the name for the appellants' make of goods, but, to put it most favourably for the appellants, designates water from particular springs belonging to them. The waters derive their virtues from the strata from which they spring, or through which they pass, before they reach the surface—that is to say, from the inherent properties of the soil itself in that particular locality. Another material fact is that the words "Caledonia Springs" and "Caledonia Water" are said to designate the Duncan Spring and its waters equally with the appellants' three springs, although the former is distant two miles from the latter and has no apparent connection with them, except that of being situate in the same township. It is quite true that the same trade name may designate the goods of more than one person, but it is less easy to infer that a geographical description has acquired a secondary meaning when you find that it is used to designate the goods of two or more persons connected only by identity of geographical origin. And whatever force there is in this observation does not appear to their Lordships to be materially weakened by the fact of there being other springs in the township which, like the "Duncan" spring, are called by different names. Lastly, it must be observed that in the present case the name of the locality necessarily enters into and forms part of any real description of the respondents' waters, and that the words "Caledonia Springs" have acquired a secondary or perhaps tertiary meaning as the name and the only name of the locality. Their Lordships agree with Maclennan J. that if the respondents' water is likely to be more sought after and more marketable, and if the business of the selling it is likely to be more profitable by reason of the situation of the springs and their nearness to the famous old springs, the respondents are entitled to the benefit of that circumstance. Indeed, it is impossible to see how the respondents could adequately describe a natural product of the soil which derives its excellence from the inherent properties of the soil in that particular locality without some reference to the place, and

using for that purpose in some form the only name by which it is known.

Their Lordships are therefore of opinion that the appellants have not a right to the exclusive use which they claim of the word "Caledonia" in connection with their waters. The Stone Ale case (*Montgomery* v. *Thompson* (1)) does not appear to them to have any bearing on the present case. That was a case of a manufactured article, and was decided on the special circumstances of the case, as clearly appears from the judgments of Lord Watson and Lord Macnaghten. The Glenfield Starch case (*Wotherspoon* v. *Currie* (2)) differs materially from the present case in the facts on which it was decided, for the term "Glenfield" was not a necessary part of the description of the manufactured article there in question, and there was evidence that the defendant's works were set up at Glenfield for the purpose of passing off their goods as those of the plaintiff. But have the respondents used the word "Caledonia" in such a manner as to pass off their water as coming from the springs of the appellants? Or have they taken adequate care to distinguish their goods from those of the appellants? In considering this question their Lordships do not forget the answer given by the respondent Lyall in his evidence when he accepted the suggestion of the plaintiffs' counsel that his object in taking hold of this water from these wells was to sell it as Caledonia water. They do not, however, attach so much importance to this piece of evidence as the learned Chancellor. From the way in which the suggestion was made and accepted they think that Lyall may not have meant more than that he desired to sell it as water from Caledonia in competition with the plaintiffs. The respondents are not proved to have ever themselves sold their water under the description of "Caledonia Water," or "Water from Caledonia Springs," but what is said is that the use by them of the word "Caledonia" in any form enables the water to be sold by the retailer as "Caledonia Water," and is therefore calculated to deceive the ultimate purchaser. Their Lordships agree with what has been frequently said in these cases, that

(1) [1891] A. C. 217. (2) L. R. 5 H. L. 508.

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even a description of goods which is literally true may be so framed as to mislead, and they bear in mind the cases of which *Johnston* v. *Orr Ewing* (1) is an example, where a trade name or mark which would not mislead the dealer has been held an infringement because it was calculated to mislead the retail purchaser.

The respondents (other than J. Tune & Son) sell their goods under the description of "Natural Saline Water from the New," or "from New Springs at Caledonia," and as "Beaver Brand," and they have a picture of a beaver on their labels as a trade-mark. It appears to their Lordships that the expressions "the new springs" or "new springs" at once distinguishes their water from the water coming from what the appellants call on one of their labels "the original springs," and no person reading the label could possibly believe he was buying water from the original springs. It is not like the case of manufactured goods where the trade name attaches to the make of a particular manufacturer, and the purchaser might then suppose he was buying a new make of the same manufacturer. In the present case the name is not personal but local, and attaches only to the particular springs. The learned Chancellor criticises the use of the word "springs" as descriptive of the source from which the respondents derive their water, but this seems hypercritical. The source is none the less a spring because it finds its way to the surface by an artificial cavity instead of a natural fissure in the soil. The learned Chancellor also criticises the use of the words "at Caledonia." He says there is no place called Caledonia simply. It is true that "Caledonia Springs" would have been more accurate, but also, probably, in the view of the plaintiffs, more objectionable. But whether the words are to be taken as referring to the township or the particular place, their Lordships agree with Maclennan J. that the words "at Caledonia" are not inaccurate, and it was pointed out that the expression is used in the sheet called "Life at the Springs," which is described as published every Saturday "at Caledonia." It is possible that the common use of the word "Caledonia" in any

(1) (1882) 7 App. Cas. 219.

form may lead to some dishonesty on the part of the retail seller. But their Lordships think that, in the peculiar circumstances of this case, the respondents cannot be made responsible for such a consequence. The plaintiffs sold their water as "Caledonia Water" at a time when they had no competitors in the sale of natural mineral waters from the place called Caledonia Springs, but in giving it that name they ran the risk of other persons discovering other springs in the same locality, and being entitled to sell other water as water coming from springs in that locality. Their Lordships hold that the respondents are entitled to indicate the local source of the waters sold by them; and so holding, they think that the burden cast upon the respondents of distinguishing their goods from those of the appellants has been discharged. "New Springs" seems at least as distinctive as Crystal Springs, which the respondents originally thought of, or "Beaver Spring," which was suggested by the counsel for the appellants.

They will, therefore, humbly advise His Majesty that the appeal should be dismissed, and the appellants will pay the costs of it.

Solicitors for appellants: *Gadsden & Treherne.*
Solicitors for respondents: *Poole & Robinson.*

[PRIVY COUNCIL.]

J. C.* 1903 Dec. 9.

ATTORNEY-GENERAL FOR THE CAPE OF GOOD HOPE. . . . . } APPELLANT;

AND

VAN REENEN . . . . . RESPONDENT.

ATTORNEY-GENERAL FOR THE CAPE OF GOOD HOPE. . . . . } APPELLANT;

AND

SMIT . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF THE CAPE OF GOOD HOPE.

Martial Law Regulations—Review of Martial Law—Convictions by Supreme Court—Jurisdiction.

The Supreme Court of the Cape of Good Hope has no jurisdiction to review judgments of Martial Law Courts.

Where a deputy administrator of martial law was also a resident magistrate, and by mistake used in proceedings relating to acts contravening martial law regulations the printed forms of his Magistrate's Court with headings appropriate thereto:—

Held, that his convictions could not on that account be quashed as irregular; it appearing that they were in fact made in the administration of martial law.

BOTH appeals were by special leave: the first from an order of the Supreme Court (July 12, 1902); the second from an order of the same Court (Aug. 28, 1902).

Van Reenen was charged on April 22, 1902, with the crime of contravening regulation 5 (A and B) Martial Law Regulations, and regulation 25, part 11, Martial Law Regulations, in that, upon March 28, 1902, at Malmesbury, he did wrongfully and unlawfully (1.) move to and fro in the district of Malmesbury without a proper permit as required by the said regulations; (2.) by removing two mules from the district of Malmesbury without a proper permit as required by the said regulations.

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD LINDLEY, and SIR ARTHUR WILSON.

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Smit on May 22, 1902, was charged with the crime of contravening regulation 10, part 11 (A), Martial Law Regulations, in that, upon (or about) the months of March and December, 1901, and at (or near) Malmesbury, in the district of Malmesbury, he did wrongfully and unlawfully make use of seditious language by raising or fomenting disaffection among His Majesty's subjects. He pleaded guilty, was convicted, and sentenced to a fine of 20*l.*, and in default one month's imprisonment with hard labour.

Both respondents pleaded not guilty. Reenen was convicted on April 22 and sentenced on the first count to fourteen days' imprisonment with hard labour; on the second count to a fine of 50*l.*, or three months' imprisonment with hard labour. These sentences were subsequently reviewed by the military authorities, and Van Reenen was released upon payment of 50*l.* Smit was convicted on May 22 and sentenced to a fine of 20*l.*, or one month's imprisonment with hard labour.

Both charges were heard by Mr. Broers, the resident magistrate for the district of Malmesbury, who under the said regulations was deputy administrator of martial law for that district. He declared upon oath that both respondents were tried before him in the latter capacity. Both cases were heard in the Court at Malmesbury. In both cases the charge, judgment, and sentence were noted on a piece of paper purporting to be the form generally used in the hearing of charges under the ordinary jurisdiction of the resident magistrate. In Reenen's case the form contained the words "In the Court of the Resident Magistrate." In the second, the form contained the words "In the Court of Resident Magistrate and Deputy Administrator of Martial Law for the District," and was signed "C. W. Broers, Acting Resident Magistrate and Deputy Administrator of Martial Law." Both respondents were aware that they were being tried for contravening martial law regulations.

The orders appealed from quashed the convictions and set aside the sentences; but it was explained that this was so far as they purported to be proceedings of a Court exercising ordinary criminal jurisdiction.

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The reasons of the Supreme Court given in Reenen's case were as follows :—

"It is on record that the applicant has been criminally convicted in the Court of the resident magistrate of Malmesbury under his 'ordinary jurisdiction,' and until that conviction so far as it purports to have been in a Colonial Court is set aside or corrected by this Court, it will carry with it the disabilities and liability to aggravated punishment which the law of this Colony imposes on persons who have been convicted of criminal offences. For instance, under the 42nd section of Act XX. of 1856, a person convicted of a trifling criminal offence may be sentenced to receive lashes if he had within two years previously been convicted of any crime or offence. But, quite independently of any such disadvantages arising from the existence of previous convictions, the applicant is, in my opinion, entitled to have it placed beyond doubt that he has not been convicted of any criminal offence recognised as such by the law of this Colony. Among the grounds on which it is competent to bring the proceedings of the inferior Courts under review are incompetency of the Court in respect of the cause, including all excess of jurisdiction and gross irregularity of the proceedings. It is not denied that if in the present case the resident magistrate had acted in his sole capacity as such magistrate, this Court would have been bound to set aside the proceedings on the ground of incompetency as well as irregularity. If he had acted in his sole capacity as administrator of martial law this Court would have declined to interfere. But the record shews that he acted in a double capacity, and, in so far as he has acted as resident magistrate, the proceedings must be set aside. The summons does not ask for an interference with the judgment of the magistrate in so far as he acted or purported to act as deputy administrator, but confines itself to the proceedings in the Court of resident magistrate, and the application must therefore be granted."

Smit's case was decided on the same grounds. A postscript thereto by the Chief Justice stated :—

"I have since read the petition for leave to appeal as set out in the order granting such leave, and I find it there stated as a

ground of such appeal that possible confusion may arise as to the nature and effect of the sentences passed, and as to a refund of the fines imposed and the rightful title to the fines which are still in the possession of the military authorities. This statement rests on an entire misapprehension of the judgment. Nothing was said by the Court that could in the remotest degree affect the validity of the sentences as sentences of a Martial Law Court, or lead to the inference that any fines in the possession of the military authorities should be refunded to the applicants. The military authorities were not represented before the Court, the only parties being the applicants on the one side, and the Attorney-General and resident magistrate on the other. The relief applied for in each case was confined to the proceedings in the respective Courts of resident magistrate, and neither summons raised any question as to the propriety of the proceedings so far as they purported to be in the Court of the deputy administrator of martial law. The affidavits certainly raised such questions, but they did not in any way affect the decision of the Court. No suggestion was made that the orders setting aside the proceedings might render the magistrate or military authorities liable to action for false imprisonment, for it was known that an Indemnity Act would be passed, and that until its passing the liability to actions for false imprisonment would exist whether the orders were granted or refused. An Act of Indemnity has since been passed, and the fact that certain proceedings in a Magistrate's Court have been set aside will not in any way prevent the operation of the Act in regard to such magistrate. The sole effect of the orders of the Supreme Court is to remove from the applicants any disrepute, disability, or other disadvantage that might arise out of the fact of their conviction before a tribunal which purported at the time of the trial to be a Court of ordinary criminal jurisdiction."

Haldane, K.C., and *Askwith*, for the appellant, contended that as matter of fact the Court which convicted and sentenced was a Martial Law Court; that the charges, conviction, and sentences were by a Martial Law Court for contravening

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martial law regulations; that the Supreme Court had no jurisdiction to review the said proceedings or any part thereof; that the records were not records of a civil Court as matter of fact, and that being records of a Martial Law Court, any addenda thereto, even if they constituted an irregularity, cannot be reviewed by the Supreme Court.

The respondents did not appear.

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The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. These are appeals from two orders of the Supreme Court of the Colony of the Cape of Good Hope by which two convictions made under martial law were ordered to be quashed, and the sentences set aside.

Their Lordships are of opinion that an error has been committed. The two convictions in question appear to have taken place before a Mr. Broers, who, besides being the deputy administrator of martial law, was also a resident magistrate. Now, what has been called over and over again in the course of these proceedings a "record" was nothing but a written memorandum of what the charge against the respondents was, the charge being in each case, on the face of it, one of contravening certain regulations of martial law. The learned Chief Justice appears to have been under the apprehension that if that memorandum were allowed to stand in the form in which it was drawn up—the printed forms of the Magistrate's Court having been used, the words "ordinary jurisdiction" and "In the Court of Resident Magistrate" were by mistake left standing in the memorandum—the persons who purported to be so convicted might afterwards be subject to some disability or disrepute, or some penal consequences by reason of the form in which the convictions were drawn up; and he appears to have been under the idea that, because this memorandum was a record, and because those irregular words were not deleted from it, some evil consequences might arise to the persons charged. It is only fair to the Chief Justice to say that he pointed out in very distinct terms that the Supreme Court had no jurisdiction to deal with or to affect the judgments of Martial Law Courts. He says so in terms, both in his original

judgment and in the explanation he has subsequently given, and of course the Supreme Court had no such jurisdiction. But it is unfortunate that he thought proper, notwithstanding his own judgment, to say that the Court granted the application, quashed the convictions, and set aside the sentences, which he had no jurisdiction whatever to do. It is difficult, in view of the very clear statement he had made, to understand how the learned Chief Justice came to the conclusion that the Supreme Court had jurisdiction to do this. The truth is that the whole matter rests upon the initial mistake of calling the memorandum a "record," and treating it as if it were a record of a Court of justice. There would be no necessity, certainly in point of law, and probably not in practice, to have a written memorandum of each sentence or judgment of the Martial Law Court; certainly no such principle applies as is known to the Courts of ordinary criminal jurisdiction in respect of records, the record being itself the official and operative order which the judgment demands. Their Lordships are of opinion that the convictions were made by Mr. Broers in his capacity of deputy administrator of martial law, and not in his capacity of resident magistrate at all, and they will, therefore, humbly advise His Majesty to reverse the orders quashing such convictions.

Their Lordships have heard these appeals ex parte, but, the Attorney-General not asking for his costs, there will be no order against the respondents.

Solicitors for appellant: *Wilson, Bristows & Carpmael.*

[PRIVY COUNCIL.]

J. C.* 1903 ~~ *Nov.* 4; *Dec.* 2.

NATAL LAND AND COLONIZATION COMPANY, LIMITED . . . . . } DEFENDANTS;

AND

PAULINE COLLIERY AND DEVELOPMENT SYNDICATE, LIMITED . . } PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Contract for Company before Incorporation—Rights of Company.

A company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence. In order to do so a new contract must be made with it after its incorporation on the terms of the old one.

Kelner v. *Baxter*, (1866) L. R. 2 C. P. 174, approved.

APPEAL from a decree of the Supreme Court (May 29, 1902).

The respondents sued, under the circumstances stated in the judgment of their Lordships, for specific performance of an agreement of lease, and execution of a proper deed of lease. The appellants pleaded that there was no privity of contract between themselves and the respondents.

The agreement sought to be enforced was contained in correspondence beginning on December 9, 1897, between the appellants' agent and Mrs. de Carrey. The respondents claimed the benefit of this contract under a cession to a trustee for them, as about to be incorporated, by Mrs. de Carrey of her rights thereunder by a deed of December 22, 1897, and a letter by the appellants dated December 30, 1897, to the solicitor of the syndicate in answer to their letter of the 29th, agreeing to the substitution of the syndicate for Mrs. de Carrey.

The appellants contended at the trial that, inasmuch as the respondents were not registered at the date of these transactions and not till January 22, 1898, there was no privity

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD LINDLEY, SIR ARTHUR WILSON, and SIR JOHN BONSER.

of contract between them. The respondents contended that there was sufficient evidence from which the Court could infer a contract between them. The Court decreed specific performance of the agreement on the following grounds :—

"Allowing that there was no valid agreement between the defendant company and the Pauline Syndicate on December 29, before their registration, we consider that the subsequent occupation and working of the land in question by the syndicate, the expenditure of money on the land in faith of the agreement, the acceptance by the defendant company of the payment of 100*l.* as a guarantee for prospecting operations, the recognition by the company of the syndicate as working under an agreement to prospect this land with a view to obtaining a lease, and the correspondence which took place after the date of registration with the defendant company, are inconsistent with any other reasonable conclusion than the actual existence of an agreement between the plaintiff syndicate and the defendant company on the basis of the contract contracted with Mrs. de Carrey on December 9, 1897. There has been part performance on the faith of an existing agreement, and the acts of both parties are unequivocally referable to the contract sued upon."

Danckwerts, *K.C.*, and *McSwinney*, for the appellants, contended that there was no evidence from which any agreement in the terms of the agreement sued upon could be implied. On the contrary, the evidence was inconsistent with such an agreement. The acts of the appellants on which the Court relied were all referable to the mistaken belief of Rycroft, the appellants' manager, that the persons who occupied and conducted boring operations on the coal company's lots were the syndicate or partnership in existence on December 30, 1897, and his mistaken belief that he was throughout dealing with such persons only. Even if the partnership acquired Mrs. de Carrey's rights under the agreement, it could not transfer them, and, accordingly, no such rights were ever acquired by the respondents. There was thus no privity between the appellants and respondents as respects the agreement of December 9,

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and no evidence of any new contract having been made, and no intention shewn on the appellants' part to accept lessees of limited liability in place of the lessees contemplated by the actual agreements made by them.

Haldane, K.C., and *Boydell Houghton*, for the respondents, contended that the contract of December 9 was valid, and its alteration on the 29th and 30th of that month gave Mrs. de Carrey the right to substitute the syndicate or the respondents as parties thereto. By her signature to the respondents' articles of association she did so substitute the respondents. In the alteration there was sufficient evidence of the creation of a new contract between the appellants and the respondents in terms of the old one, and the Court below had rightly found in its favour. It appears that the appellants acquiesced in the exercise by the respondents of the right to extend the option of prospecting contained in the contract, in their prospecting during the whole of the extended term, in their expenditure of money in prospecting and boring operations.

Danckwerts, K.C., replied.

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The judgment of their Lordships was delivered by

LORD DAVEY. The appellants are an incorporated joint stock company, having their head office in London. Prior to and in the month of December, 1897, a Mr. Rycroft was their general manager in Natal under a power of attorney dated October 26, 1888, by the terms of which he was empowered to sell and lease the company's lands in the Colony and to make contracts for these purposes. On December 9, 1897, Rycroft, on behalf of the appellants, made a contract with a Mrs. de Carrey respecting the coal mining rights in 3000 odd acres of land belonging to the appellants, and known as the Coal Company's Lots. The terms of this agreement are contained in seven letters extending from November 30 to December 9, 1897, between Rycroft and Messrs. Shepstone, Wylie & Binns, then acting as solicitors for Mrs. de Carrey. The material terms are as follows: (1.) Mrs. de Carrey was to have an option, i.e., a right of prospecting for coal, for six months from December 20, 1897, with power to extend the option for a further

period of three months; (2.) the option was not assignable; (3.) that Mrs. de Carrey should have the right during the continuance of the option to call for a lease of the coal mining rights for a term of three years, subject to payment of certain rents and royalties, with power to extend the term to thirty-one years; (4.) Mrs. de Carrey was to have the right to sell the lease to a joint stock company fulfilling certain specified conditions; (5.) Mrs. de Carrey was to pay or hand over to the appellants 25 per cent. of the value received from the sale of the lease in shares or cash or both at the option of the appellants; (6.) Mrs. de Carrey was to pay the appellants 100*l.*, to be forfeited in case the lease was not taken up, but to be repaid on compliance with certain conditions.

By an agreement dated December 22, 1897, and expressed to be made between William Louch, "in his capacity as a provisional director of the Pauline Colliery and Developing Syndicate about to be registered . . . . under the laws of the" South African "Republic," of the one part and Mrs. de Carrey of the other part, Mrs. de Carrey sold and purported to assign to Louch all her interest in (inter alia) the above option in consideration of 300*l.* cash and 10,000 shares in the syndicate. Mr. Rycroft was not informed of this agreement or of the assignment purported to be made by Mrs. de Carrey, and did not in fact know of it until December 17, 1898.

On December 29, 1897, the solicitors acting for Mrs. de Carrey wrote to Rycroft requesting him, as (it was stated) Mrs. de Carrey was really acting as the nominee of the syndicate, to insert a new clause in the agreement giving her the right to cede and transfer all her rights in the option to the Pauline Syndicate on the condition that the syndicate should assume all the rights and obligations to the appellants under the agreement. And on the following day Rycroft wrote to the solicitors a letter containing the following passage: "I beg to say that it was understood at the time of making the agreement with Mrs. de Carrey that she and the original (or parent) syndicate were one and the same, therefore I could not have any objection to the Pauline Colliery and Developing Syndicate being substituted under section 4 of your letter of the 8th

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instant (Mrs. de Carrey's consent to the alteration, you assure me, has been obtained) for Mrs. de Carrey."

At this time Rycroft was not aware of the assignment to Louch which had already been made by Mrs. de Carrey by the agreement of December 22, 1897, and he did not know what was the constitution of the so-called syndicate, or who were the persons who composed it, or what person he had agreed to substitute for Mrs. de Carrey. Their Lordships, however, will assume that the substitution was within his powers. The respondent company was not incorporated until January 22, 1898, on which date it was registered as a joint stock company with limited liability at Pretoria under the laws of the late South African Republic. The 100*l.* payable under the agreement was paid to Rycroft by the unincorporated syndicate before the incorporation of the respondent company. This sum was subsequently (on November 25, 1898) repaid by Rycroft to one Thurston by the order of Mrs. de Carrey.

On January 31, 1898, Rycroft wrote to the solicitors of Mrs. de Carrey and the syndicate a letter containing a copy of a telegram which (he says) he had that morning received from the appellants' London office. The telegram was as follows :—

"Umhlali matter was not in accordance with instructions. Do nothing further. Inform Binns must wait board's orders."

Binns was a member of the firm of Shepstone, Wylie & Binns, the solicitors for Mrs. de Carrey, the unincorporated syndicate, and the respondent company. Rycroft's comment on this telegram in his letter was: "I do not know what particular part of our negotiations this may refer to; but if anything more is required of me by the Pauline Syndicate or Mrs. de Carrey, I am bound by these instructions to await orders from the board."

Their Lordships are of opinion that after this date Rycroft had no authority to make a new agreement or to vary the existing agreement, or in any other way to bind the appellants in the matter.

The term was extended to September 30, 1898, as provided in the agreement. The respondents had been engaged in boring for coal on an adjoining property, and did not prospect

or bore for coal on the property of the appellants till shortly before the expiration of the extended term, and very little work appears to have been done. But on September 15, 1898, the secretary of the respondents, by a letter of that date, informed Rycroft that his board was given to understand that his syndicate had struck a 3 ft. 8 in. seam of coal on the appellants' property at a depth of 293 feet, and claimed a lease to the respondents on terms of the correspondence between Rycroft and Messrs. Shepstone, Wylie & Binns, which they alleged constituted an agreement between the appellants and the respondents. Rycroft on the same day answered the letter, stating that he should send a copy of it to the London secretary of his company to be laid before the board for their instructions. On December 12, 1898, Rycroft, acting under the instructions of the appellants' board, declined to entertain the claim, but offered to consider an application for a lease at the same rent and royalties, but subject to certain conditions. This offer was not accepted.

On May 30, 1899, the respondents commenced the present action against the appellants for specific performance of the agreement contained in the seven letters dated November 30 to December 9, 1897, or in the alternative for damages. In their declaration the respondents alleged that on December 22, 1897, they acquired all the interest of Mrs. de Carrey in the agreement, but did not allege any other assignment to them or title to the benefit of the agreement.

The appellants in their plea to the declaration averred that there was no contract between the respondents and themselves, and alleged that the agreement to substitute the syndicate for Mrs. de Carrey was obtained from Rycroft by misrepresentation, the misrepresentation charged being that Mr. Binns and Louch had represented that Mrs. de Carrey had been acting for the syndicate all through the negotiations, whereas the syndicate or Louch had purchased the benefit of the agreement from her for a large sum.

The Court, consisting of Finnemore J. and Mr. Acting Justice Beaumont, decided in favour of the respondents on both points, and by their judgment of May 29, 1902, decreed specific

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performance of the agreement with costs. On the question of privity of contract, they seem to have held that a new contract on the terms of the old one had been made between the appellants and the respondents. The acts of part performance which were relied on by the learned judges as evidence of such new contract were the occupation and working of the land in question by the respondents, the expenditure of money on the faith of the agreement, and the acceptance by the appellants of the payment of 100*l.* as a guarantee for prospecting operations. This sum, however (as already stated), was in fact paid before the incorporation of the respondents.

Their Lordships do not think it necessary to say whether the agreement was or was not voidable on the grounds alleged, or on other grounds appearing in the correspondence, because they are clearly of opinion that there was no contract between the appellants and the respondents. The contract was made with Mrs. de Carrey, and even if she can be treated as having made it on behalf either of the unincorporated syndicate, who were the promoters of the respondent company, or on behalf of the company itself when incorporated, it is clear that a company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence. It is unnecessary to cite all the cases in which this has been decided from *Kelner* v. *Baxter* (1) downwards. But the facts may shew that a new contract was made with the company after its incorporation on the terms of the old contract. The circumstances relied on for that purpose in the present case are not, in the opinion of their Lordships, necessarily referable to, and do not necessarily imply, a new contract with the respondents. But a conclusive reason which negatives any new contract is that Rycroft, by whose agency the new contract must be supposed to have been made, had no power or authority after January 31, 1898, to make such a contract on behalf of the appellants, and his want of authority was known to the solicitors acting for the respondents. He was not either the actual or the ostensible agent for that purpose of the appellants.

(1) L. R. 2 C. P. 174.

Their Lordships will, therefore, humbly advise His Majesty that the judgment of May 29, 1902, ought to be reversed, and that instead thereof judgment ought to be given for the defendants in the action with costs. The respondents will also pay the costs of this appeal.

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Solicitors for appellants: *Kimbers & Boatman.*
Solicitors for respondents: *Budd, Johnsons & Jecks.*

[PRIVY COUNCIL.]

CHAPPELLE . . . . . SUPPLIANT;

AND

THE KING . . . . . RESPONDENT.

AND CROSS-APPEALS.

CARMACK . . . . . SUPPLIANT;

AND

THE KING . . . . . RESPONDENT.

TWEED AND ANOTHER . . . . . SUPPLIANTS;

AND

THE KING . . . . . RESPONDENT.

J. C.* 1903 *July* 16, 17, 22; *Dec.* 2.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Canada—Dominion Lands Act (Revised Statutes of Canada, c. 54), s. 47—Mining Regulations of 1889, s. 17—Rights of Placer Miner as to Renewal of his Grant—Construction.

Sect. 17 of the Mining Regulations passed under the Dominion Lands Act (Revised Statutes of Canada, c. 54) does not on its true construction extend to the holder of a grant for placer mining the same privileges as to a renewal of his grant which are accorded to the holder of a quartz mining grant.

The placer miner on renewal (to which he has no absolute, but only a preferential, right) holds under an annual grant in substitution for, but not in continuation of, his original grant. And the renewed grant is

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* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

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subject to all such regulations as may be in force at the date when it comes into operation, whether or not it was made during the currency of an existing grant:—

Held, that the Governor in Council has power to make regulations requiring the placer miner to pay a percentage on the proceeds realized from the grant. Such an imposition, called a royalty, is not a tax, but is a reservation which the owner in fee is entitled to make out of his grant.

THREE appeals and cross-appeal consolidated from three decrees of the Supreme Court of Canada (Nov. 18, 1902) reversing decrees of the Exchequer Court of Canada (April 21, 1902).

The question was whether certain mining royalties collected by the Crown in the year 1898 in the Yukon Territory on gold washed and realized during the spring and early summer of 1898 were lawfully and properly collected, or whether the appellants were entitled to have any, and which, of the same repaid.

Chappelle claimed repayment of $12,066.00, of which $10,429.00 had been paid as the Government royalty on the gold produced on the Claim No. 7, Eldorado Creek, and $1,637.00 on the gold produced on the Claim No. 3A below Discovery Hunker Creek.

Carmack claimed repayment of $19,289.00, which had been paid as the Government royalty on gold produced on various claims on Bonanza Creek.

Tweed and Woog claimed repayment of $8,568.00, which had been paid as the Government royalty on gold produced on various claims on Eldorado Creek and Bonanza Creek.

The four appellants above named were holders of original discovery grants which gave to each of them for the term of one year "the exclusive right of entry upon the claim for the miner-like working thereof, and the construction of a residence thereon, and the exclusive right to all the proceeds realized therefrom"; and also further provided that the rights thereby granted were those laid down in the Dominion Mining Regulations, and no more, and were subject to all the provisions of the said regulations, whether the same were expressed in the grant or not.

During the currency of these original discovery grants, an

order of the Governor in Council was passed (operative from September 11, 1897) purporting to authorize a royalty of from 10 to 20 per cent. on all gold mined from placer gold mining claims in the Yukon. Afterwards, in the autumn and early winter of 1897, the appellants Chappelle, Carmack, and Woog respectively obtained renewal grants for the season of 1897–98 in the same terms as those expressed in their original discovery grants.

The Exchequer Court held that the terms of the miners' renewal grants should be construed by reference to their meaning in their original discovery grants; and that the gold won from the claims of the present appellants was not subject to the royalty imposed by the Order in Council. The Exchequer Court also held that the operative words of the Order in Council purporting to impose the royalty, namely, "a royalty shall be levied and collected," were apt words for the imposition of a tax, but that such tax could not be levied without legislative authority therefor, and accordingly gave judgment for the suppliant miners, with a reference.

By a majority judgment the Supreme Court in effect held (inter alia) that the Dominion Government, by subsequent regulations made under the Dominion Lands Act, may validly impose a royalty on gold produced by placer mining in the Yukon, although the miner by his licence has the exclusive right of entry upon the mining claim, and the exclusive right to all the proceeds realized therefrom; and, further, that the exclusive "rights" thus given to the miner are not exclusive of the grantor, the Dominion Government. The Supreme Court, however, unanimously affirmed the judgment of the Exchequer Court in favour of Chappelle, in holding that the provision of s. 91 of the Dominion Lands Act, requiring that regulations or amendments thereto made under the Act shall have effect only after publication for four successive weeks in the *Canada Gazette*, meant that such regulations do not become operative until the expiration of one week from the date of issue of the *Gazette* containing the fourth publication thereof; and that, consequently, the Order in Council purporting to impose the royalty (the validity whereof the appellants other-

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wise dispute), which was thus published for the fourth time in the *Gazette* of September 4, 1897, did not become operative until September 11, and hence did not affect the gold mined from Chappelle's "claim" on Eldorado Creek, the grant for which had been duly renewed two days previously, on September 9, 1897.

Davies J. in his judgment held, with regard to the use of the term "exclusive right" in the Crown's grants, that "this phrase has simply reference to other persons, and does not refer, and cannot refer, to any reservation which in the same document the Crown may reserve to itself. There was no necessity or sense," said Davies J., "in using it with respect to the Crown, the licensor, because the grant would without the words in question confer on the licensee the right as against the grantor; but they were used as against other persons holding quartz licences, or hydraulic licences, or surface rights on and over the claim, and to ensure the placer licensee the indisputable right to the gold he won from his claim."

Sir R. Reid, K.C., and *Travers Lewis*, for the appellants, contended that the grants contained no reservation by the Crown of a royalty. The exclusive right of entry, &c., granted to the miner in terms by the Crown should be construed as meaning "exclusive of the grantor, the Government." The contract with the appellants contained in the Crown grants and in the Regulations of 1889 granted to the appellants, not only exclusive rights of entry upon their claims, but also the exclusive right to all the gold won therefrom. The grantor cannot subsequently derogate therefrom. The Regulations of 1889, under which the appellants renewed their grants in 1897, were not repealed by the new Regulations of 1897 and 1898, but were expressly preserved by them. Sect. 17 of those regulations placed the holder of a placer mining grant on the same footing as the holder of a quartz mining grant in respect of his right of renewal thereof on the terms originally granted to him. The Order in Council of September 11, 1897, was promulgated subsequently to the grants, and was therefore inapplicable thereto. The order, moreover, was in form and

effect a tax, admittedly without antecedent legislative authority to support it. The regulations did not reserve a royalty, nor did the grant. It was an imposition not contemplated by the Dominion Lands Act or any other Act. It was in derogation of the appellants' rights both under their discovery grants and also their renewal grants.

C. Robinson, K.C., Newcombe, K.C., Osler, K.C., and *Loehnis*, for the respondent, contended that the appeals should be dismissed and the cross-appeal allowed. The original grant or licence was only for one year. It conferred no interest continuing after the expiration of that year. There was no obligation on the Crown to renew it. If the Crown renewed, the renewal was a fresh contract made subject to any new regulations which might have been made during the currency of the expired grant—that is, subject to any regulations in force on the day on which the renewed grant became effective. All grants made after the publication of the Regulations of July 29, 1897, e.g., the grant to Chappelle on December 7, 1897, were subject to the payment of a royalty. Those regulations did not impose a tax, but reserved a royalty out of the grants, which was a term or condition of the holding. They were effective from September 4, 1897—that is, when they were published for the fourth time. The grant to Tweed on March 31, 1898, was either under the Regulations of 1897 or 1898, and was liable to the royalty. The renewal grant to Chappelle on September 9, 1897, was, as contended in the cross-appeal, subject to the Regulations of September 4, 1897, and was liable to the royalty.

Sir R. Reid, K.C., replied.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This case presents in the form of a consolidated appeal three several appeals brought by special leave of His Majesty from the Supreme Court of Canada, which reversed the judgment of Burbidge J. in the Exchequer Court by a majority of three judges to two. In each of the three appeals His Majesty the King is the sole respondent. In one—Chappelle's case—in which the Crown was not wholly

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successful before the Supreme Court, there is a cross-appeal on behalf of His Majesty.

The questions in debate relate to the position and rights of placer miners in the Yukon Territory holding under renewal grants on the one hand, and the powers of the Crown as limited by statute and defined by regulations issued by the Governor in Council on the other.

There are no facts in dispute. All the evidence is common to all the three cases; indeed, there is in substance no difference between the cases except that which arises from difference in date of licences and regulations. The cases themselves may be regarded as test cases. The ultimate decision will govern a number of similar claims, amounting, it is said, in value to more than $300,000, which in the meantime have been stayed by arrangement between the claimants and the Crown.

All the material facts and all the arguments on the one side and on the other are to be found in the judgments of Taschereau J. (now Chief Justice) and Sedgewick J. in favour of the suppliants, and in the judgment of Davies J. in favour of the Crown.

The judgment of Davies J. appears to their Lordships to deal with the subject in a manner which leaves nothing to be desired. It is concise, clear, and convincing. Their Lordships are unable to add anything to it in the way of argument. They will, therefore, content themselves with adopting it without qualification, and stating as briefly as possible their conclusions on the various points most strongly pressed at the bar.

The main contention on behalf of the suppliants was that a placer miner had an absolute right to the renewal of his grant for a term of five years on the conditions of the original grant, and subject only to the regulations in force when that grant was obtained.

Now the Dominion Lands Act (chapter 54 of the Revised Statutes of Canada, 1886) in s. 47 declares that "lands containing coal or other minerals, whether in surveyed or unsurveyed territory, ... shall be disposed of in such manner and on

such terms and conditions as are from time to time fixed by the Governor in Council by regulations made in that behalf." Under this statute regulations for the disposal of mining claims had been made in 1889. These regulations were in force in the Yukon Territory when Chappelle first lodged an application for a grant for placer mining in respect of a claim in Hunker Creek known as "Fractional Mining Claim No. 3A below Discovery." Placer mining, speaking roughly, consists in collecting and washing for gold the superficial detritus. It differs from quartz mining mainly in this—that whereas quartz mining requires expensive machinery, placer mining for the most part is carried on by manual labour. The Regulations of 1889 dealt both with quartz mining and placer mining, and, as might be expected, they dealt with the two methods in a different manner. The quartz miner having complied with the prescribed conditions, and having paid the required fee, obtains from the agent of Dominion lands a receipt according to Form B in the schedule authorizing him to enter into possession of the location applied for, and subject to its renewal from year to year as" thereinafter "provided during the term of five years from its date to take therefrom and dispose of any mineral deposit contained within its boundaries," provided that he expends during each of the five years a sum of at least $100 in actual mining operations on the claim. Thereupon, subject to the payment of the prescribed fee, the agent issues another receipt in Form C in the schedule, which entitles the claimant to hold the location for another year. At any time before the expiry of the five years the claimant is entitled to purchase the location at so much per acre on proving that he has complied with the requirements of the regulations in that behalf. As regards placer mining, the forms of application for a grant for that purpose and the grant for the same were to be those contained in Forms H and I in the schedule, and it was provided by s. 20 that "the entry of every holder of a grant for placer mining must be renewed and his receipt relinquished and replaced every year, the entry fee being paid each time." According to Form I the Minister of the Interior grants to the claimant "for the term of one year . . . . the

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exclusive right of entry upon the claim" as described "for the miner-like working thereof, and the construction of a residence thereon, and the exclusive right to all the proceeds realized therefrom." Form I then proceeds to state that the grant does not convey any surface rights in the claim or any right of ownership in the soil covered by the claim, and that the rights granted are those laid down in the Mining Regulations and no more, and are subject to all the provisions of the said regulations, whether the same are expressed in the grant or not.

Now, if the case rested there, there would be nothing to support the claim advanced on behalf of the suppliants. The difficulty, such as it is, is created by s. 17, which heads the provisions relating to placer mining, and is expressed in the following terms:—

"Sect. 17. The regulations hereinbefore laid down in respect of quartz mining shall be applicable to placer mining so far as they relate to entries, entry fees, assignments, marking of locations, agents' receipts, and generally where they can be applied save and except as otherwise herein provided."

The argument on behalf of the suppliants was based on this section. Much reliance was placed on the expression "agents' receipts," which occurs in it. It was contended that the effect of making the regulations, so far as they related to agents' receipts in the case of quartz mining, applicable also to placer mining was to extend to the holder of a grant for placer mining the right of renewal by annual grants for the full period of five years on the terms and conditions of the original grant.

It is certainly not easy to understand what is meant by the reference to "agents' receipts" in s. 17. The words may have crept in through inadvertence, or they may be susceptible of some explanation not yet discovered. But however their presence is to be accounted for, it appears to their Lordships that they cannot be construed so as to contravene the plain intention appearing on the face of the regulations and forms relating to placer mining, especially having regard to the saving and exception with which s. 17 concludes. Their Lordships, therefore, are of opinion that the placer miner on renewal holds under an annual grant in substitution for, but

not in continuation of, his original grant. He has no absolute right to renewal. He has no doubt a preferential right of renewal, because no interloper can be in a position to make the affidavit required to entitle him to a grant of the claim so long as the original occupant complies with the requirements of his grant and applies in due time for a renewal.

Their Lordships are further of opinion that a placer miner obtaining a renewal grant in due course holds his claim subject to all such regulations as may be in force at the date when the renewal grant comes into operation.

In some cases it appears that for the convenience of the miner a renewed grant was issued during the currency of an existing grant. It was argued that the miner, having got possession of a renewal grant, was not liable to be affected by regulations not then in force but coming into operation before the expiry of the existing grant. Their Lordships are unable to accede to this argument. Their Lordships think that a renewal grant must be subject to all regulations in force at the date when it comes into operation.

It was further argued on behalf of the suppliants that the Governor in Council had no power to make regulations requiring the placer miner to pay a percentage on the proceeds realized from his claim. Such an imposition, it was urged, was contrary to the terms of the grant which gave the miner exclusive right to all such proceeds, and it was besides nothing more or less than a tax which could only be imposed by authority of Parliament. Their Lordships do not think that there is any substance in either of these objections. The imposition, though it may be regarded as a tax in one point of view, is, in their Lordships' opinion, a reservation out of the grant which it was competent for the grantor as owner in fee to make. And their Lordships agree with the Supreme Court in thinking that the expression "exclusive right" in the grant does not mean a right exclusive of the Crown, but a right exclusive of all persons other than the Crown.

In the result, therefore, their Lordships are of opinion that the appeals fail.

Their Lordships are further of opinion that the cross-appeal

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on behalf of the Crown fails also. That depends upon a very short point. By the Dominion Lands Act, s. 91, it was provided that every order or regulation made by the Governor in Council shall have force and effect only after the same has been published for four successive weeks in the *Canada Gazette*. Now the regulations under which the Crown claims to be entitled to the payment which is the subject of the cross-appeal had been published in four successive weekly issues of the *Gazette* when Chappelle obtained his renewal grant. But the period of four weeks from the date of the first issue had not then expired, and therefore it seems to their Lordships impossible to contend that those regulations had been published in the *Gazette* for the period required by the Act and that Chappelle's renewal grant was subject to them.

Two further contentions were advanced on behalf of the Crown which do not seem to their Lordships to require a serious answer. It was said that this exaction to which Chappelle was compelled to submit, at the peril of forfeiting his grant, was a voluntary payment on his part. It was no more voluntary than the payment which Custom House officials exact from a traveller in respect of dutiable goods. It was also said that the Crown, having exacted this payment from Chappelle, could not, when it was determined that the Crown had no right to the money, safely return it to the person from whom it was taken, but that there must be a judicial inquiry which might be prolonged indefinitely for the purpose of satisfying the Crown that no one but Chappelle was entitled to the refund. It is certainly a novel proposition that A., having taken money from B. wrongfully, is entitled, before he restores it, to put B. to proof of his title. This contention, though it seems to have found favour with the Court of first instance, is, in their Lordships' opinion, contrary to principle.

One other point remains to be noticed. In Chappelle's printed case interest is claimed against the Crown in respect of the money held to have been illegally exacted. Their Lordships express no opinion upon this point because it formed no part of the appeal to the Supreme Court. The question of

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interest was reserved by the judge of first instance, and all parties seem to have acquiesced in that reservation whatever the effect of the reservation may be. Even if the question were now open, their Lordships would be loth to decide it without having the benefit of the opinion of the learned judges of the Supreme Court.

Their Lordships will, therefore, humbly advise His Majesty that the appeals and the cross-appeal ought to be dismissed.

Under the circumstances their Lordships do not think fit to make any order as to costs.

Solicitors for appellants: *Harrison & Powell.*
Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

COMMISSIONER OF STAMP DUTIES . APPELLANT;

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STEPHEN . . . . . RESPONDENT.

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ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Stamp Duties Act, 1898, *s.* 49, *sub-s.* 2 *A* (*a*)—*Construction—Duty claimed on Property subject to special Power of Appointment by Deceased.*

Mere general language in a probate duty statute applicable to the property of deceased persons and to property subject to their general power of appointment does not extend to property subject to a special power to appoint amongst a limited class. The intention to include the latter must be clearly expressed and accompanied by apt provisions:—

Held, on a consideration of all the provisions of the New South Wales Stamp Duties Act, 1898, that s. 49, sub-s. 2 A (*a*), does not on its true construction apply to property over which a deceased person has only a special as distinguished from a general power of appointment by will.

APPEAL from an order of the Supreme Court (Nov. 6, 1902) made on a special case stated under s. 18 of the Stamp Duties

* *Present:* LORD MACNAGHTEN, LORD LINDLEY, SIR ANDREW SCOBLE, SIR ARTHUR WILSON, and SIR JOHN BONSER.

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Act, 1898, the facts contained in which are sufficiently set out in the judgment of their Lordships.

The appellant included in his assessment to probate duty the property in respect of which the special powers contained in the will had been exercised. The executor contended that under the circumstances the sum in dispute was not chargeable as probate duty, and was not payable by the executor out of the testatrix's estate. The Supreme Court, while declining to decide whether the duty was payable, held that at all events it was not payable by the executor.

Vaughan Hawkins, for the appellant, contended that the executor was liable to pay the assessment in question. By the true construction of ss. 4, 49, sub-s. 1, and s. 49, sub-s. 2 A (*a*), of the Act of 1898, and the 3rd schedule thereto, duty on the estate of a deceased person who dies testate is to be levied and paid by a stamp duty on the probate. That duty is to be at the rate specified in the 3rd schedule. It is to be charged in respect of (inter alia) all estate which the deceased has disposed of by will under any power of appointment whether general or special. The duty imposed is payable by the executor as a condition of his taking out probate. The duty on the property appointed by the testatrix by her will in this case was part of the duty on her estate within the meaning of the Act, and therefore was payable by her executor. There was no legal ground for excluding it. Reference was made to *Oke* v. *Heath* (1) to shew that, if a limited power of appointment is executed by will, it amounts to a testamentary disposition; and the instrument of appointment must be construed to all intents like a will and possess all its qualities.

Terrell, *K.C.*, and *M. C. Stephen*, for the respondent, contended that the property in question was wrongly included in the assessment to probate duty. It was trust property, and cannot be regarded as property which belonged to the testatrix within the meaning and for the purposes of s. 49, sub-s. 1. The appellant was bound to shew that he is entitled to the duty claimed by the clear and unambiguous wording of the

(1) (1748) 1 Ves. Sen. 134, 139.

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Act. The Act does not in express words include property in s. 49, sub-s. 2 A (*a*), which has been disposed of by will under a special power of appointment. Nor is there any other provision in the Act which supports a contention to that effect. Even if any duty is chargeable on trust property disposed of by special power of appointment according to the terms of the trust, whether by deed or by will, the accident of the power being exercised by will does not make it the property of the testatrix, liable in that respect to probate duty claimable from the executor.

Asquith, K.C., replied.

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The judgment of their Lordships was delivered by

LORD LINDLEY. The question to be determined on this appeal is whether probate duty is payable in New South Wales in respect of property appointed by will under a special power to appoint amongst a limited class of persons. The facts are stated in a special case, and are shortly as follows:—

In 1842 a settlement was made on the marriage of Mr. and Mrs. O'Connell; and property belonging to the lady was vested in trustees upon trust (as regards the property now in question) for her for life for her separate use, and after her death upon trust for the children of the marriage as she should by will appoint, and in default of appointment for them in equal shares.

There were children of the marriage. Mrs. O'Connell died on December 2, 1901, leaving a will by which she disposed of property as to which no question arises, and appointed the property, settled as above mentioned, amongst her children in certain proportions. She appointed the respondent, A. C. Stephen, her executor. The value of the property so appointed was 25,543*l.*, and the question is whether, under the Stamp Duties Acts of New South Wales, her executor had to pay duty on this sum in order to obtain probate of her will. The Commissioner of Stamp Duties insisted on payment of duty on this sum; and the executor paid it, but required a case to be stated for the decision of the Supreme Court upon the question whether the Commissioner was right in his

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assessment, and in requiring this duty to be paid by the executor. The Supreme Court decided this question in favour of the executor, and hence this appeal.

Before examining the Stamp Duties Acts applicable to the case, it will conduce to clearness if a few preliminary general observations are made and borne in mind.

The distinction between a person's own property and property which is not his own, but which he can dispose of by will in any way he pleases by virtue of a power conferred upon him, is well established. Such last-mentioned property is not his own in any proper sense; and even if he executes the power by his will, no probate duty is payable upon that property unless such duty is made payable by a statute so worded as clearly to comprehend it. A statute imposing duty on a testator's property generally is not sufficient for this purpose. This was finally settled in *Drake* v. *Attorney-General* (1), affirming *Platt* v. *Routh*. (2)

But it has long been settled that property appointed by will under a general power of appointment is subject to the payment of the appointor's debts: *Beyfus* v. *Lawley* (3); and if such property is personal property, it is equitable assets of the testator which his executor can claim for distribution in the proper order: see *In re Hoskin's Trusts* (4) and *In re Lawley*. (5) Notwithstanding, therefore, the difference between a person's own property and property which he can dispose of as he pleases and does dispose of, although it is not his own, the distinction is one which the Legislature can hardly be expected to recognise when imposing probate or other duties payable on the death of a person who has exercised his power of disposition. Accordingly, modern Acts imposing such duties are almost always, if not always, so framed as to include both classes of property; and this is reasonable and just.

But a special power to appoint property amongst a limited class of persons is so entirely different in its scope and operation from a general power of disposition, that mere general

(1) (1843) 10 Cl. & F. 257; 52 R. R. 122, 131.
(2) (1840) 6 M. & W. 756; 55 R. R. 777.
(3) [1903] A. C. 411.
(4) (1877) 6 Ch. D. 281.
(5) [1902] 2 Ch. 799, at p. 807.

language in a probate duty statute, applicable to the property of deceased persons and to property subject to a general power of appointment, cannot reasonably be supposed to be meant to extend to property subject to a special power only. If it is intended to include such property, and to compel the executor of the appointor to pay duty on property with which the executor has no concern, and which he has no right to collect, it is only reasonable to suppose that such intention will be clearly expressed, and be accompanied by provisions for practically carrying it out without injustice.

Passing now to the statute applicable to the case, namely, Act No. 27 of 1898, consolidating the laws relating to stamp duties, the statute will be seen to be divided into parts. Part I. is headed "Preliminary," and contains a definition clause (s. 3) and an enacting clause (s. 4) imposing the duties mentioned in the 2nd and 3rd schedules, subject to the exemptions contained therein. Part II. and Sched II. relate to duties on deeds and instruments inter vivos, but not to wills. Part III. and Sched. III. relate to "Duties on Estates of Deceased Persons." This expression is not of itself sufficient to extend to property over which a deceased person had even a general power of appointment. Sect. 49, sub-s. 1, is confined to duties payable on the property of deceased persons, and is not applicable to the property in question in this case. Then comes clause 2, which is much wider, and clearly covers property over which the deceased had a general power of appointment by deed or will. The clause runs thus :—

"Duties to be levied, collected, and paid according to the duties mentioned in the said third schedule shall also be charged and chargeable upon and in respect of :—

"(A) All estate, whether real or personal—

"(*a*) Which any person, dying after the twenty-second day of May, one thousand eight hundred and ninety-four, has disposed of, whether before or after that date, by will or by settlement containing any trust in respect of that estate to take effect after his death, under any authority enabling that person to dispose of the same by will or deed, as the case may be."

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The 3rd schedule to the Act is as follows :—

"Third Schedule.

"*Duties on the Estates of Deceased Persons.*

"Part I.

"On the probate or letters of administration to be granted in respect of any estate real and personal of deceased persons.

"Where the value of such estate is under," &c.

Then follow the rates :—

"Part II.

"2. Settlement of property taking effect after death of settlor—same duties as under Part I."

Their Lordships are of opinion that the foregoing language would be wide enough to cover property over which a deceased person had only a special power of appointment if there was any indication of an intention to include such property; for such a power is to some extent and in some sense a power of disposition, although within narrow limits. But the language itself is much more appropriate to general powers of disposition than to special powers of selection or distribution amongst a particular class, and the words cannot, in their Lordships' opinion, be extended so as to include the latter class of powers without some plainer indication of intention to include them. No such indication is to be found. On the other hand, there are indications, and strong indications, to shew that such a result could not have been intended.

There is no clause to the effect that such property shall be deemed to form part of the deceased's estate (as in s. 52); and there is no resemblance between property appointed under a special testamentary power and those properties which once belonged to the deceased, and which are made chargeable under the later clauses of s. 49 and under s. 52. But what is very significant is the exemption in the 2nd schedule of appointments by deed in exercise of powers contained in deeds or wills duly stamped. If the settlement of 1842 had conferred on the testatrix a special power to appoint by deed or will and she had appointed by deed, that appointment would have been

exempt from duty; and yet if s. 49, sub-s. 2 A (*a*), is construed as the appellant contends, the appointment by will is chargeable with duty. A construction which produces this result should not be adopted in the absence of language so clear that its meaning cannot be mistaken.

Again, if this duty is probate duty payable by the executor, it is to be deemed to be a debt of the testatrix payable out of her personal estate (s. 56), and probate is not to issue until the duty is paid by the executor (s. 57). This machinery is adapted to property of a deceased person, and to property over which he has a general power of appointment exercised by his will; but it is obviously inapplicable to the present case.

Their Lordships have, therefore, come to the conclusion that s. 49, sub-s. 2 A (*a*), of the Stamp Duties Act, 1898, does not apply to property over which a deceased person has only a special, as distinguished from a general, power of appointment by will.

They will, therefore, humbly advise His Majesty to dismiss the appeal, and the appellant must pay the costs of it.

Solicitor for appellant: *G. M. Light.*
Solicitor for respondent: *G. Slade.*

[PRIVY COUNCIL.]

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ATTORNEY-GENERAL OF BRITISH COLUMBIA . . . . . } Appellant;

AND

OSTRUM . . . . . Respondent.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

British Columbia Assessment Act, 1897—*Construction*—"*Income.*"

Held, that, on the true construction of the British Columbia Assessment Act (R. S. c. 179), the word "income" includes all gains and profits derived from personal exertions, whether such gains and profits are fixed or fluctuating, certain or precarious, whatever may be the principle or basis of calculation.

Appeal by special leave from an order of the Supreme Court (June 25, 1902) reversing an order of Irving J. (May 1, 1902) on a matter referred by the Lieutenant-Governor in Council under s. 98 of the Supreme Court Act (R. S. 1897, c. 56).

The respondent and the other persons whom he represents are locomotive engineers in the employment of the Canadian Pacific Railway Company who were not paid salaries, but received pay according to the number of miles they ran their locomotives. On December 10, 1900, the provincial assessor at Vancouver assessed them for income tax upon annual income in excess of $1000 under s. 3 of the Assessment Act (R. S. 1897, c. 179), an Act which contains no express definition of the term "income." It was subsequently defined by an Amendment Act, 1901 (1 Edw. 7, c. 56), which did not come into force till May 11, 1901.

The respondent's counsel in the Colony contended that the earnings of the engineers were not income within the meaning of that term as employed in the principal Act. Irving J. decided in favour of the Crown that as no statutory definition was given, the term must receive its ordinary popular

* *Present:* Lord Macnaghten, Lord Lindley, Sir Andrew Scoble, Sir Arthur Wilson, and Sir John Bonser.

and natural meaning in the same way as people in ordinary life would use it.

In appeal the Chief Justice said: "We are all agreed that these earnings are not taxable. The word 'income,' as used in the statute, would seem, after comparison of the various passages where it occurs, to point to receipts of a settled or permanent character, such as by way of salary or investment, and not to ungained earnings of this type. At any rate the word is ambiguous, as the Legislature evidently thought when it passed s. 2 of the amending Act of 1901, and any ambiguity in a taxing Act is always resolved in favour of the subject: see *Oriental Bank Corporation* v. *Wright*. (1)"

Drake J. said: "Income in s. 3 is not liable to taxation until it is ascertained by actual receipt. If the Legislature wished to tax the income of wage earners, it would not be impossible to use apt words therefor. In my opinion the term 'income' in the Act does not, and was not, intended to include money received in wages for the personal labour of locomotive engineers who are not paid by salaries, and who have no income until it is earned. The taxing clause is s. 3, and we must attribute the ordinary meaning to the term income, something which has been received, gained, or earned, and until it is so received, gained, or earned it is not income. The fact that the assessor makes returns based on previous years of salary or otherwise will not in my opinion do away with the necessity of imposing the tax by apt words making income to include unearned wages."

C. A. Russell, K.C., and *W. Wills*, for the appellant, contended that the judgment of Irving J. should be restored. The term "income" in s. 3 bears its ordinary and natural meaning, and the earnings of the respondent and the other engineers were income according to that meaning, notwithstanding that they may have fluctuated in amount. Sect. 32 (*c*), (*d*) has not the effect of cutting down and restricting the effect of s. 3, nor is it confined according to its true construction to earnings ejusdem generis with salary.

(1) (1880) 5 App. Cas. 842, 856.

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The mere fact that the earnings in question had not been received, earned, or ascertained did not exempt them from taxation as income. For s. 32 (*d*) provided that the assessment should be based upon the receipts of the preceding year, subject to an equitable adjustment as therein provided. They cited *Ex parte Benwell* (1); *In re Jones* (2); *Lowther* v. *Bentinck*. (3)

The respondent did not appear.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This appeal turns on the meaning of the expression "income" in the Assessment Act, c. 179 of the Revised Statutes of British Columbia, 1897. The Act contains no definition of the word. But it explains "personal property" as comprehending, among other things, "all income," and it declares that "all land and personal property and income in the province shall be liable to taxation," subject to certain exemptions, including the exemption of "the income of every person up to one thousand dollars."

The question was raised at the instance of certain locomotive engineers in the employment of the Canadian Pacific Railway. Railway servants in that class are, it seems, not paid by wages or by salary, but according to a mileage rate on the number of miles they run their engines. It was contended on their behalf that the amount of their annual remuneration under this arrangement in excess of the statutory limit of $1000 was not "income" within the meaning of that word in the Assessment Act. The point was referred by the Lieutenant-Governor of the province under the Supreme Court Act to a judge of the Supreme Court for hearing and consideration. Irving J., before whom the matter came in the first instance, decided in favour of the Crown, but, on appeal, his decision was reversed by the unanimous judgment of the Full Court.

The question has been set at rest for the future by an amending Act, passed in 1901, which explains the expression "income" in terms sufficient to negative the effect of the

(1) (1884) 14 Q. B. D. 301. (2) [1891] 2 Q. B. 231.
(3) (1874) L. R. 19 Eq. 166.

decision of the Full Court. But owing to the confusion said to have been created by that decision in the meantime, it seemed right to this Board to advise His Majesty to grant special leave to appeal on terms reserving to their Lordships power to provide for the costs of the respondent. The respondent, however, has not appeared to support the decision appealed from.

Their Lordships are of opinion that there is no ground for cutting down the plain and ordinary meaning of the word "income." In their view the expression was intended to include, and does include, all gains and profits derived from personal exertions, whether such gains and profits are fixed or fluctuating, certain or precarious, whatever may be the principle or basis of calculation.

The learned judges in the Full Court seem to have held that nothing was to be regarded as "income" for the purpose of taxation but what was actually "received, gained, or earned." "It is quite possible," said Drake J., who gave the leading judgment, "that an income tax could be imposed upon personal earnings which have been received; but in my opinion," he added, "it cannot be imposed on unascertained earnings in the nature of wages because it is not income until it is earned." But then the scheme of the Assessment Act and of every other income tax Act with which their Lordships are familiar is to provide for the collection of the tax on the basis of the gains and profits of an earlier period. The scheme is plain enough. The province is to be divided into districts. For each district an assessor is to be appointed. The duty of the assessor is to make up the assessment roll in each year. Everybody, when required, is to furnish returns of his property or income liable to be assessed; as regards income, the expression in the section relating to returns (s. 32 (*c*)) is, "income whether derivable from salary or otherwise"—an expression which seems to comprehend every possible source of income. Then every assessor is to begin to make up his roll in each year not later than July 10, and to complete it on or before November 1; and, lastly, the Act provides that "in each year the taxes shall be deemed to be due and collected under the roll revised during

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the previous year" (s. 78), and that "the taxes assessed, levied, and collected under the Act shall be deemed to be due and payable on the second day of January in each year" (s. 79).

The conclusion at which their Lordships have arrived is (1.) that the language of the section in the Assessment Act imposing a tax on income is clear and unambiguous, and (2.) that no ambiguity is introduced by the language of the section relating to returns. Their Lordships desire to add that in construing this Act no assistance, in their opinion, is to be obtained from decisions or dicta turning on expressions found in the English Bankruptcy Act. The language is not the same, and the scope of the enactment is widely different.

Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be allowed, the order of the Full Court discharged, and questions submitted to the Full Court answered in accordance with the opinion of Irving J.

Their Lordships make no order as to costs.

Solicitors for appellant: *Gard, Rook & Winterbotham.*

[PRIVY COUNCIL.]

MITCHELL . . . . . PLAINTIFF; J. C.* 1903

AND

NEW ZEALAND LOAN AND MERCANTILE COMPANY AND OTHERS . . . } DEFENDANTS. *June* 11; *July* 8.

Ex parte MITCHELL.

ON APPEAL FROM THE SUPREME COURT OF NEW ZEALAND.

Practice—Special Leave to Appeal in Formâ Pauperis—Certificate of Counsel.

Petition for special leave to appeal in formâ pauperis refused on the merits. It was explained that in accordance with English practice, so far as the same was applicable, the absence of a certificate signed by independent counsel, that is who had not appeared in the Court below, was not in itself a sufficient ground for a local Court of Appeal refusing leave to appeal in similar form from the Court of first instance.

THIS was a petition for special leave to appeal in formâ pauperis from a decree of the Supreme Court (Nov. 17, 1902) holden at Wellington.

An application to the Court of Appeal in New Zealand for leave to appeal thereto in formâ pauperis from the said decree had been refused, the Court declining to accept the certificate of the counsel who had conducted the petitioner's case in the Court below that in his opinion it was a proper case for appeal.

Griffith Jones, for the petitioner, cited *Lyall* v. *Jardine* (1); *Kelly* v. *Corlett* (2); *Quinlan* v. *Child.* (3)

Tyrell Paine, for the respondents.

The judgment of their Lordships was delivered by 1903 *July* 8.

LORD MACNAGHTEN. This is an application for special leave to appeal in formâ pauperis from a judgment of the

* *Present*: LORD MACNAGHTEN, LORD ROBERTSON, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

(1) (1870) L. R. 3 P. C. 318, 326. (2) (1860) 14 Moo. P. C. 89, 91.
(3) [1900] A. C. 496.

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Supreme Court of New Zealand sitting as a Court of first instance.

The action was based on loose and general allegations of fraud, breach of trust, and conspiracy. After a trial before Edwards J., without a jury, which lasted eleven days, the learned judge delivered a considered judgment nonsuiting the plaintiff or dismissing the action with costs. The plaintiff then applied to the Full Court for leave to appeal in formâ pauperis. The application was accompanied by a certificate of the gentleman who had acted both as solicitor and counsel for the plaintiff in the Court below. Leave was granted in the first instance, but afterwards recalled on the motion of the respondents, and apparently upon the sole ground that the plaintiff's application had not been supported by the certificate of an independent counsel.

From that order there is no appeal to His Majesty in Council. Nor indeed could there be an appeal from such an order. It is within the discretion of the Court to say upon what terms an appeal in formâ pauperis should be admitted, and the Court no doubt has power to require any special certificate which it may think necessary in any particular case. Inasmuch, however, as their Lordships are informed that in New Zealand there are no Rules of Court dealing with the matter, and that the Court there acts in analogy or supposed analogy to the practice in this country, it may perhaps be useful to explain what the practice of the Court of Appeal in England is. Their Lordships have been informed by the senior registrar of the Chancery Division that applications to appeal in formâ pauperis by persons not paupers in the Court below are extremely rare, that there is no instance known to him in which such an application has been refused on the ground that it was not supported by the certificate of an independent counsel or in which such a certificate has been called for, and that the practice may be taken to be that the certificate of counsel who argued the case in the Court below is accepted by the Court of Appeal.

Passing from this point, their Lordships have considered

whether the case is one in which it would be proper for them to advise His Majesty to grant special leave to appeal in formâ pauperis. They have been furnished with the pleadings in the action, and with a copy of the judgment delivered by the learned judge. The judgment is very full and clear, and it sets out in detail all the documents on which the petitioner seems to have relied. The learned counsel for the petitioner frankly admitted that he had no fault to find with the statement of facts contained in the judgment. His only quarrel was with the law there laid down. Their Lordships, therefore, are in a position to judge for themselves whether there is or is not a primâ facie ground for the appeal.

The case is somewhat complicated, and, as the learned judge observes, incumbered with a mass of irrelevant evidence. The substance of it, however, may be stated briefly. The petitioner was the owner of freezing works and a butchery business in Wanganui. In the autumn of 1899 the respondent company became agents for the disposal of the produce of his works. They were not his agents for any other purpose. They were not his partners or his co-adventurers. Nor were were they in any sense trustees for him except as regards the proceeds of sales coming to their hands. They took over the account of the New Zealand Bank, who had previously financed the petitioner in his business with a result which was not satisfactory either to the petitioner or to the bank. The bank had a guarantee from a person of the name of Reid. Reid himself held a mortgage or mortgages for 16,000*l.* upon the petitioner's real estate. When the company took over the petitioner's account with the bank, Reid gave them his guarantee for 8000*l.* and one year's interest on that sum. Beyond that they had no security. They obtained no charge upon the petitioner's real estate or upon the chattels and effects employed in the business.

It was part of the arrangement between the company and the petitioner that the respondent Johnson, whose brother was in the employment of the company, should be appointed to supervise and control the business in the interest of the

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company and Reid. His salary was to be paid by the petitioner, but his duty was to keep the company and Reid acquainted with the position of affairs from time to time.

The company was induced to enter into business relations with the petitioner mainly by the representations of the respondent Stevenson, who was in their employment, and who seems to have thought that, if the business were properly managed, it would prove highly remunerative. These expectations, however, were disappointed, and the indebtedness of the petitioner to the company kept increasing.

In August, 1900, the petitioner left New Zealand on a visit to England, having appointed his solicitor and his son and Johnson his attorneys. He did not return till some time in September, 1901. During his absence things went on at first much as usual. In February, 1901, however, errors were discovered in the accounts which alarmed the company. The errors were serious, and the trade was not prospering. The petitioner, when in England, with the knowledge and sanction of the company, sought assistance from persons interested in the New Zealand meat trade. From time to time he sent hopeful and reassuring cablegrams to New Zealand, but he gave no definite information to the company there. As time went on, they kept pressing him to return at once. He treated the matter in a very leisurely fashion, and the respondents became more and more dissatisfied. In the course of an interview with the petitioner's son in July, 1901, Johnson obtained and copied a letter from the petitioner to his son which the petitioner evidently wished to be kept secret from the company. The letter shewed that the petitioner was not making any provision to protect the interests of the company. Their debt was now about 20,000*l.*, and they had no security but Reid's guarantee. So they determined to get Reid's securities into their own hands before the petitioner's return, and without letting him know anything about their intentions. On September 7, 1901, they made an agreement with Reid which gave them the option of buying up Reid's securities on advantageous terms, and it was part of the arrangement that, if possible, steps should be taken to get rid of the petitioner,

and that the company and Reid, both of whom stood to lose heavily in the event of the failure of the business, should carry on the works in partnership or dispose of them for their mutual benefit. Reid's securities were afterwards transferred to Johnson as trustee for the company.

This agreement with Reid is the first and principal ground of complaint on the part of the petitioner. His case is that, somehow or other, the company was in a fiduciary position towards him, and that they became and were trustees for him of the securities they purchased from Reid. Oddly enough, at the very same time the petitioner maintains that Reid was more or less incapable of transacting business, and that he too was a victim of the company's fraud. It is impossible to understand the supposed equity on which the petitioner relies. The company were clearly entitled to protect their interest as creditors notwithstanding their relations with the petitioner, and they were under no legal obligation to disclose to the petitioner the steps which they thought it necessary or expedient to take for their own protection. If Reid's securities were bought at an undervalue and under circumstances which gave him a right to complain, that is not a matter which concerns the petitioner.

On September 30, 1901, shortly after the petitioner's return to New Zealand under pressure which the company brought to bear upon him, the petitioner executed an assignment of all his property with certain exceptions to Johnson upon trust for his creditors. At this time the petitioner was not aware of the company's arrangement with Reid.

After a considerable interval, during which the petitioner seems to have been afforded every opportunity of making arrangements with the view of retrieving his position, the company entered into possession as mortgagees, and advertisements for sale were issued. Then the petitioner learnt from Reid the arrangements which had been made between him and the company. This action was commenced and an injunction was obtained, on some ground which does not appear, restraining the sale until the hearing.

The assignment of September 30, 1901, is the second ground

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of complaint. The answer to this part of the case, however, is that there was nothing illegal in the pressure which the company as creditors brought to bear upon their debtor. Moreover, the transaction, as the learned judge observes, was carried out under the advice of the petitioner's own solicitor, and what was done was, as the learned judge finds, the best thing for the petitioner to do under the circumstances.

The charge of conspiracy against the company, Johnson, and Stevenson, in respect of which the petitioner claimed damages to the amount of 10,000*l.*, seems absurd. The learned judge has found as a fact that there was no conspiracy at all.

So far as their Lordships can judge from the materials before them, which in this case are remarkably ample and complete, there is absolutely no foundation for the superstructure on which the petitioner seeks to rest his claim to relief.

Their Lordships are of opinion that the learned judge was quite right, and that there is no case for the appeal. Their Lordships will, therefore, humbly advise His Majesty that the petition ought to be dismissed, but that, in the circumstances, the Council Office fees ought to be remitted.

Solicitor for petitioner: *Oscar Edmonds.*

[HOUSE OF LORDS.]

MAYOR, &c., OF EASTBOURNE . . . APPELLANTS; AND ATTORNEY-GENERAL . . . . . RESPONDENT.

H. L. (E.) 1904 Feb. 15.

Revenue—Stamp Duty—Property purchased under Statutory Power—Conveyance—Duty on Transfer of Personal Property—Finance Act, 1895 (*c.* 16), *s.* 12.

Sect. 12 of the Finance Act, 1895, applies to personal as well as real property, so that a person purchasing land and goods under statutory authority must produce to the Inland Revenue a conveyance of the goods as well as of the land, and pay ad valorem stamp duty upon the whole of the property.

The decision of the Court of Appeal, [1902] 1 K. B. 403, affirmed.

In 1899, by a contract under the powers of Electric Lighting Orders Confirmation Acts, 1890 and 1899, the appellants bought from the Eastbourne Electric Light Company, Limited, the company's undertaking, with some freehold land and building, plant, tools, &c., for a sum of money. The appellants having refused to produce to the Inland Revenue a conveyance of the personal property and to pay stamp duty thereon, on the ground that they were liable only to produce a conveyance of and to pay stamp duty on the real property, an information was filed by the Attorney-General, and a special case was stated raising that question.

The King's Bench Division (Kennedy and Phillimore JJ.) (1) gave judgment for the Crown, and this decision was affirmed by the Court of Appeal (Collins M.R., Stirling and Mathew L.JJ. (2)) Hence this appeal.

Feb. 12, 15. *Danckwerts, K.C.*, and *Macoun*, for the appellants. The Finance Act, 1875, did not intend to impose any new duty or require a conveyance of any property which may pass by delivery or without a conveyance. The Act requires the production of a written conveyance in the case of

(1) [1901] 2 K. B. 773. (2) [1902] 1 K. B. 403.

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purchases under statutory authority only where by law a written conveyance is required to pass the title. The statute authorizing the purchase is itself the written conveyance.

Sir E. Carson, *S.-G.*, and *Rowlatt*, for the respondent, were not heard.

EARL OF HALSBURY L.C. My Lords, we have had a very long and ingenious argument on this question, which seems to me to be a very plain one. I certainly do not mean to go through all the different and ingenious hypotheses which have been put forward in order to shew that the plain words of the Act may be cut down and reduced to an absurdity. I think so far as there is any argument at all, the whole question turns upon the word "conveyance," and although with some hesitation, and a considerable amount of circumlocution, the junior counsel has addressed to us what I must admit to be a learned and ingenious argument, it simply comes to this: that the statute is intended in its operation to apply only to land, or what would be equivalent to land, in its natural sense. But the whole of that argument seems to depend upon the use of the word "conveyance" which he says only means, according to the technical view, a conveyance of land or realty in some form, whether it be land or not. My answer to that is that it is not true. The word "conveyance" means what it says. I find in Wharton's Law Lexicon that he defines it as "an instrument that transfers property from one person to another." That is all; and although it may be perfectly true to say that where you are dealing with personal property it may pass and does pass completely by mere delivery, it is a very illogical consequence of that proposition to suggest that it may not pass in any other way, and that you may not convey it by an ordinary conveyance. I think you may.

My Lords, I think that really disposes of the whole argument. When I look at the statute itself and see what it does, I am content to apply it to the particular facts with which your Lordships have to deal. It seems to me that it would be impossible to say, having regard to these particular facts, that the case is not included in the language of the statute. We

have heard a great deal about confusion, about ambiguity, and about alternative constructions, but when I apply the language of the statute to the transaction which is engaging our attention, it appears to me to be as clear as possible that in the ordinary natural meaning of the words therein employed the statute does apply to this transaction.

I decline to go into hypotheses about other cases in which it might be supposed that this language would be too wide and would include something else. It is enough for me to say that as applicable to this particular transaction the words seem to me to be absolutely clear, without confusion, and without any alternative construction at all, and to apply literally and strictly to the transaction in question.

For these reasons I move your Lordships that the judgment appealed from be affirmed and the appeal dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD SHAND. My Lords, I also am of the same opinion. It appears to me that the very purpose of the Act of 1895 was to enlarge the subject of taxation, so that personal property bought under statutory authority should be liable to duty just as heritable property was previously liable. The Act, I think, succeeded in its purpose, and I agree in the opinions of their Lordships in the Courts below, and with my noble and learned friend on the Woolsack and Lord Macnaghten, that the judgment must be affirmed and the appeal dismissed.

LORD LINDLEY. My Lords, I am of the same opinion. I think the case becomes absolutely clear if you read the section shortly, leaving out the words which are not applicable to the present case. The section runs thus: "Where after the passing of this Act by virtue of any Act whether passed before or after this Act any person is authorized to purchase property such person shall within three months after the completion of the purchase produce to the Commissioners of Inland Revenue an instrument of conveyance of the property" (that is of the property which the purchaser is authorized by

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an Act of Parliament to purchase) "duly stamped with the ad valorem duty payable upon a conveyance on sale of the property." Now what is that? What is the property of which an instrument of conveyance is to be produced, and what is the property the ad valorem value of which is to govern the stamp? It is obviously the property which the purchaser is authorized by an Act of Parliament to purchase. I think it is plain that this Act was not intended to affect ordinary purchases made in the ordinary course of business. It was confined, and intended to be confined, to purchases expressly authorized by some special Act of Parliament, the property being, if not accurately defined, at all events described in the Act. That gets rid of the whole difficulty. There is no ambiguity about it. Every word in this section has its natural meaning, and requires no forced construction whatever. The whole fallacy of the argument on the part of the appellants appears to me to be this: that because personal chattels pass, or can pass, by delivery without any instrument at all, it cannot have been intended that there should be an intrument of conveyance for them. That is not the case. Here the Act of Parliament requires that there shall be an instrument, and being required it must be stamped. The difficulty suggested by the appellants arises entirely from not seeing that the Act does not apply to ordinary purchases in the ordinary course of business, but is confined to special purchases specially authorized.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, February 15, 1904.

Solicitors: *Sharpe, Parker & Co., for H. W. Fovargue, Eastbourne; F. C. Gore, Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

THE SARAGOSSA AND MEDITERRANEAN RAILWAY COMPANY . . } APPELLANTS;

AND

COLLINGHAM AND OTHERS . . . . RESPONDENTS.

H. L. (E.) 1904 March 10.

Practice—Compromise—Power of Court to bind Absent Persons—Extent of Jurisdiction—Rules of Supreme Court, Order XVI., r. 9A.

An action having been brought on behalf of the holders of bonds (payable to bearer), issued by a railway company, against the trustees for the bondholders and the company, the Court in 1894 sanctioned a scheme for the compromise of the action, under which all the bondholders should receive a certain sum in respect of each bond delivered up to be cancelled, and ordered that the scheme should be binding on all the bondholders who were not parties to the proceedings:—

Held, that the Court had jurisdiction to make an order on the holders of outstanding bonds whose names and addresses had not been discovered, to come in within a period of six months and accept the sum per bond, or be excluded from the benefit of the scheme.

The decision of the Court of Appeal, reported as *Collingham* v. *Sloper*, [1901] 1 Ch. 769, reversed.

THIS was an appeal from a decision of the Court of Appeal (Rigby and Stirling L.JJ., Vaughan Williams L.J. dissenting), refusing to make an order of the kind stated in the head-note. The circumstances are fully set forth in the report of the proceedings before the Court of Appeal, and need not be repeated here.

Feb. 23. *Upjohn, K.C.*, and *Martelli*, for the appellants.
Butcher, K.C., and *A. F. Peterson*, for the respondents.

THE HOUSE (Earl of Halsbury L.C., and Lords Macnaghten and Lindley) gave no formal judgment, but expressed their dissent from the views of Rigby and Stirling L.JJ., and directed the case to stand over that an order might be drawn up.

March 10. THE EARL OF HALSBURY L.C. moved the following order:—

Order of the Court of Appeal discharged, and, in lieu thereof, cause remitted to the Chancery

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Division, with directions to order that, the railway company undertaking not to dispute the right of the holders of the outstanding bonds or obligations to a valid charge on the property of the railway, a period of six months' time be limited within which the holders of the first mortgage bonds or obligations issued by the said defendant company should come in, under the provisions of the scheme sanctioned by the order of the Court of Appeal, dated the 9*th August,* 1894, *and accept the sum of* 2*l.* 10*s. per obligation under the provisions of that scheme, and that the holders of such bonds or obligations, who do not come in under the provisions of the said scheme and accept the said sum of* 2*l.* 10*s. per obligation in pursuance thereof within the time so limited, be deemed to have elected not to take the benefit of the said scheme, but to rely on the charge on the railway property comprised in, or charged by, the said obligations and the trust deed, dated the* 6*th day of October,* 1887, *for securing the same, and that such holders be excluded from the benefit of the said scheme, and the judgment dated the* 27*th day of January,* 1893, *and the said order dated the* 9*th August,* 1894*; and that the said order be advertised forthwith in such form and in such newspapers as the master may approve. The costs of the appellants and the respondents incurred in respect of the appeal to this House to be paid out of the fund in court standing to the credit of certain actions.*

Lords' Journals, March 10, 1904.

Solicitors: *Francis & Johnson; Petch & Co.*

[HOUSE OF LORDS.]

HUNTER . . . . . APPELLANT; H. L. (E.)

AND 1904

THE KING . . . . . RESPONDENT. *March* 15.

Revenue—Income Tax—Deductions—Premium on Life Insurance—Income Tax Act, 1853 (*c.* 34), *s.* 54.

Where under a life insurance policy the insurer advances the annual premium to the assured as a loan on the security of the policy, and gives him receipts for the premium as "paid," the assured is not entitled to deduct the amount of the premium from his profits and gains under Sched. D of the Income Tax Act; for it is not in fact "paid by him" within the meaning of the Income Tax Act, 1853 (c. 34), s. 54.

So *held* by the Earl of Halsbury L.C. and Lords Macnaghten, Davey, Robertson, and Lindley, Lord James of Hereford dissenting.

The decision of the Court of Appeal, [1903] 1 K. B. 514, affirmed.

In 1896 the appellant insured his life with the London Life Association, Limited, for 1500*l.*, the premium being 66*l.* 17*s.* 6*d.*, and the receipt being expressed to be for that sum, "including 33*l.* advanced by the association." In fact the appellant paid only 33*l.* 17*s.* 6*d.* in cash. In accordance with the terms of the policy and an agreement made in 1897 the appellant paid in each of the years 1897, 1898, and 1899 the sum of 33*l.* 17*s.* 6*d.* in cash, and the balance, 33*l.*, was advanced to him by the association by way of loan upon the security of the policy, and the appellant paid the association interest at 4*l.* per cent. per annum upon the advances. The receipts given by the association were for "the sum of 66*l.* 17*s.* 6*d.*, being the amount of one year's premium. 66*l.* 17*s.* 6*d.* amount paid."

The appellant was assessed to the income tax under Sched. D on the assumption that he was entitled to deduct 33*l.* 17*s.* 6*d.* only. In 1900 he presented a petition of right claiming 3*l.* 6*s.*, the income tax paid in respect of the 33*l.* for the three years. The question whether a petition of right could lie having been waived by the Attorney-General, Phillimore J. held that the appellant was entitled to deduct 66*l.* 17*s.* 6*d.* as being the annual premium paid by him. (1)

(1) [1902] 2 K. B. 255.

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This decision was reversed by the Court of Appeal (Vaughan Williams, Stirling, and Mathew L.JJ.) (1), who held that the appellant was only entitled to deduct the 33*l.* 17*s.* 6*d.*

By the Income Tax Act, 1853 (c. 34), s. 54, any person who shall have insured his life shall be entitled to deduct the amount of the annual premium "paid by him" from the profits or gains assessable under Sched. D.

Danckwerts, K.C., and *Acland, K.C.*, for the appellant. The association treated the 33*l.* as paid by the appellant in the receipts they gave him, and they are estopped from denying that it was in fact and in law a payment. If the appellant had borrowed the 33*l.* from some other person and with the loan paid that sum in cash he could clearly have deducted it under the statute. Is there any difference in principle when the association is the lender? At common law such a transaction is equivalent to payment though no cash actually passes. The association might sue the assured for the amount. If they recovered it would not that be a "payment"?

Sir R. Finlay, A.-G. (*Sir E. Carson, S.-G.*, and *Rowlatt* with him), for the respondent.

Danckwerts, K.C., in reply.

EARL OF HALSBURY L.C. My Lords, it appears to me that this judgment ought to be affirmed. The whole point is that the exemption or deduction, or whatever it is to be called, is to be allowed to the assured if the premium has been "paid by him"; and the whole reason I give for my judgment is that it has not been paid by him. I move your Lordships that the appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I quite agree.

LORD DAVEY. My Lords, I am of the same opinion. The argument presented by Mr. Danckwerts, based on the charge on the policy, appears to have some weight, because it appears, as between the assured and the insurance company, that the premium has been paid. But that is not the question; the

(1) [1903] 1 K. B. 514.

question is whether the assured has paid the premium so as to obtain the benefit of the exemption.

Looking at the whole transaction it appears to me that it was a scheme of some ingenuity whereby the insurance company invited people to insure their lives in the company's office on the footing of half the annual premiums for seven years not having to be found in cash; and the very merit of the scheme is that the assured will not have to pay in cash the whole of the premiums. In these circumstances I think the entry in the ledger is a perfectly accurate entry, that 33*l.* 17*s.* 6*d.* is paid, and that 33*l.* remained "on credit." It may be that the insured was liable to be sued for that 33*l.*; but he was willing to run that risk, no doubt, for the sake of obtaining the very favourable terms which were offered to him by the insurance company, who were not likely to injure their business by taking such a step.

LORD JAMES. My Lords, I have entertained considerable doubt in this case, and I express my opinion with very great hesitation as to whether I am right; but on the whole I have come to the conclusion that this payment does in fact exist, and that, therefore, the appellant is entitled to succeed.

I am aware of the statement that this transaction as regards the 33*l.* was described as "on credit"; that, of course, is substantially in favour of the opinion your Lordships have expressed. But I am disposed to look rather at the real substance of the transaction as it is found in the charge on the policy. It is admitted that the parties have acted in perfect good faith in this arrangement which has taken place; whether it is an ingenious one or not it is certainly an honest transaction; and there as between the two parties this sum is treated as an advance upon loan, and it is admitted that upon that document between them an action could have been brought, so that at any time, if the company chose to take that course (although it may be one which they would not have taken in fact) they could have sued upon it.

It appears to me there is nothing in the transaction that can be condemned, either in the nature of the transaction itself or

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as being legally in fault. If one party chose to say to the other, "I will lend you money with one hand and receive it with the other," it seems to me that that was a transaction of loan with a charge of interest upon that loan, and was treated by the parties in good faith as a loan; and that being so, it would be a "payment" in the same way, as has been mentioned at the bar, as if the money had been borrowed from a third person, or as if there had been two different departments in the same office in which the transaction had taken place.

For these reasons, with very great diffidence, I differ from my noble and learned friends; for, looking at the case as a whole, which is full of difficulties, though it is a short one, it appears to me that the appellant is entitled to succeed.

LORD ROBERTSON. My Lords, I agree with the motion which has been proposed, upon the very simple and sufficient ground stated by my noble and learned friend on the Woolsack. The whole argument of the appellant has been that, in a question between the assured and the insurance company, he must be held to have paid the larger sum. But in point of fact, in a question of the extent by which his income was diminished during the year by the payment, there can be no doubt that it was only by 33*l.*, and not by 66*l.*

LORD LINDLEY. My Lords, I am of the same opinion. I think the judgment of Mathew L.J. is absolutely unanswerable. I say this bearing in mind that the old common law plea of payment could be proved by shewing a settlement of account and payment of the balance. But a settlement of an account deferring payment is not such a payment as is contemplated by the Income Tax Act.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Solicitors: *Hunter & Haynes; Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

NEW BALKIS EERSTELING, LIMITED Appellants; AND RANDT GOLD MINING COMPANY. . Respondents.

H. L. (E.) 1904 March 25.

Company — Call unpaid — Forfeited Shares, Sale of—Power to make fresh Call on Purchaser—Certificate—Companies Act, 1862 (*c.* 89), *Sched. I., Table A, art.* 22.

When shares which have been forfeited for non-payment of a call are sold, and a certificate of proprietorship is delivered to the purchaser under art. 22 of Table A of the Companies Act, 1862, stating that he is to be deemed to be the holder of the shares "discharged from all calls due prior to the date" of the certificate, he is liable for the payment of future calls duly made.

The decision of the Court of Appeal, [1903] 1 K. B. 461, affirmed.

Shares in the respondent company were issued by the respondents at the nominal value of 5*s.* a share. Upon these shares 3*s.* 4*d.* was paid, and in 1898 a call of 1*s.* 8*d.* was made upon the then holders, who failed to pay it. The shares were then duly declared forfeited to the respondent company, and in 1900 they sold the shares to the appellants and gave them a certificate under art. 22 of Table A of the Companies Act, 1862. The terms of the certificate are stated in Lord Macnaghten's judgment.

Afterwards a call of 1*s.* 3*d.* was duly made by the respondents, and an action against the appellants brought by the respondents to recover it. Bucknill J. gave judgment for the respondents, and this decision was affirmed by the Court of Appeal (Earl of Halsbury L.C., Lord Alverstone C.J., and Sir F. H. Jeune). (1) Hence this appeal

Haldane, K.C., and *C. C. Scott* (*A. T. Lawrence, K.C.*, with them), for the appellants. A call once made, the power to make it is gone: the liability is merged and the calling faculty exhausted. If no certificate had been given the appellants would have been liable to the payment of the call for the

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non-payment of which the shares were forfeited. The certificate is the evidence of a bargain between the company and the purchaser that the shares are sold discharged from all liability upon them. The former owners who made default in paying the then call remained liable and should have been sued by the respondents.

[They cited the cases referred to in the Court below.]

Sir Robert Reid, K.C., and *Clauson*, for the respondents, were not heard.

LORD MACNAGHTEN. It seems to me that the whole question depends upon the true construction of the certificate, which is in accordance with the general principles of company law relating to limited companies, and follows in terms the provisions of Table A of the Act of 1862. The general principle is that every member of a company limited by shares is liable in respect of all moneys payable upon his shares to pay every call that is duly made upon him. Now the certificate is in these terms: "This to certify that the New Balkis Eersteling, Limited," "is the holder of forty thousand shares of five shillings each" (then it sets out their numbers) "upon which the sum of three shillings fourpence per share has been paid." That of course means that there is still a liability of 1*s.* 8*d.* per share. The provisions of Table A require that in the case of forfeiture "a certificate of proprietorship shall be delivered to a purchaser," and the certificate is to specify the shares held by him, the amount paid up and the amount of liability upon those shares. Therefore, so far, the certificate in this case is entirely in accordance with the requirements of Table A—it leaves the appellants liable on the face of the certificate for the 1*s.* 8*d.* per share which is unpaid. The contest has arisen upon the latter part of the certificate. It is in these terms: "The remaining one shilling eightpence per share has been called up and is payable by the African Gold Properties, Limited, who were the holders of the said shares prior to the same being forfeited." That is a statement of fact which is literally and accurately true. Then it goes on to say: "And the said New Balkis Eersteling, Limited, is to

be deemed to be the holder of the said shares discharged from all calls due prior to the date hereof." That follows the language of art. 22 in Table A, which says that "A certificate of proprietorship shall be delivered to a purchaser, and thereupon he shall be deemed the holder of such share discharged from all calls due prior to such purchase."

It seems to me that that was a very reasonable provision to make, because if the purchaser were not so discharged questions might arise as to whether he was or was not liable to pay interest in respect of the calls which had been made. The intention seems to me to be that the purchaser is to get a certificate of proprietorship like everybody else specifying what has been paid on his shares, and leaving him liable in respect of the balance to any call which the company may properly make.

As regards this call, there is no objection taken to it for want of formality or regularity or anything of that kind. It is a call duly made, which the appellants are liable to pay, and therefore I move your Lordships that this appeal be dismissed with costs.

LORD DAVEY. My Lords, I confess that in the course of Mr. Haldane's argument I had some doubt whether the order which is appealed from should be supported or not; but reflection has satisfied me that the decision of Bucknill J., affirmed by the Court of Appeal, is correct.

The certificate follows the terms of Table A, art. 22. If it is in accordance with art. 22, no question of ultra vires can arise, because it would be ridiculous to say that that which is prescribed by an Act of Parliament, for the model articles of a company formed under that Act, could be ultra vires. The question really turns upon the construction of a few words in art. 22, namely, what is meant by saying that the purchaser of a forfeited share from the company is to be "deemed to be the holder of such share discharged from all calls due prior to such purchase." Does that mean that he is to be discharged from the liability to pay the amount of calls already due, or does it mean that the demand which has been

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made is no longer to affect the title to his share? The words rather favour the first construction, because they are "discharged from all calls due." Now what is due is the amount of the previous call, not the demand itself; the demand itself is not due, but the amount of the previous call is. But looking at the whole section and the context in which it is found, and also at the nature of the transaction, I think the meaning must be that the holder of the share as such is to be discharged from any liability under the previous demand. The purport and effect of art. 22 and, reading the whole of it, the intention is to give the holder of the purchased share a good title—that is to say, a clear title to the share which he purchases unaffected by the proceedings which have previously taken place arising out of the non-payment of the previous demand. He is to be in the same position as if that prior call had never been made.

That is a mere question of quieting and perfecting the purchaser's title, and it does not appear to me to affect the question of what it is that he purchases. Now what is it that he purchases? Upon this certificate there can be no doubt: it is that he purchases a 5*s.* share on which 3*s.* 4*d.* only has been paid up, and therefore the holder of that share under the Act and the previous clauses in Table A will be liable to pay the extra 1*s.* 8*d.* Whether the company could make a contract to relieve him from the payment of that 1*s.* 8*d.* is, I think, hardly doubtful. They could not do so unless they are expressly authorized. Now there is nothing in art. 22, as I read it, which authorizes the company to relieve him from the payment of that 1*s.* 8*d.* Therefore the result is this, that the purchaser purchases the share talis qualis—that is to say, a share upon which 3*s.* 4*d.* only has been paid up. He is relieved from any liability under the previous call which has been made by the company and from any consequences of not complying with that call, but he is subject to any call which the company may properly make. He is in the same position in all respects as if those previous calls had never been made.

LORD JAMES OF HEREFORD. My Lords, when I first read the papers in this case, I confess I shared the doubts to which

my noble and learned friend, Lord Davey, has referred as having been entertained by him; but as the case proceeded it seemed to me that the result, which has now been stated by my noble and learned friend, was perfectly accurate.

The question is really contained in the last words which my noble friend has just uttered. It was contended at the bar, as I understand, that the company had no power to make a second call on the shares which had been forfeited. It seems to me that it is in that statement that the fallacy lies. I can see no reason why, when the shares have been forfeited and no call has been received on them, the power of the company should be taken away, and that it should be prevented from obtaining the amount that may be necessary to put it in funds for carrying on the business of the company by making a second call. The non-payment of a call cannot be equivalent to the receipt of it in any shape or form. That being so, there is nothing injurious to the public interest, and nothing contrary to the equities existing between the parties, that this call should be made and enforced against the present appellants.

LORD ROBERTSON. My Lords, I entirely agree.

LORD LINDLEY. My Lords, I am of the same opinion. I am not surprised at this certificate being construed in different ways by different people; in order to understand it, one must understand the subject-matter to which it relates. It is said that a forfeited share is like a table or a chair or any other property which the company has at its disposal. It is nothing of the sort. A forfeited share which is either sold or reissued or parted with, with a view of future use, is a share in the company—which confers rights and involves liabilities.

The short answer to the appellants' case appears to me to be this: nobody who knows anything at all about companies and shares, and the forms of documents which are in use in business, would dream of taking this certificate as a certificate for a fully paid-up share. It is nothing of the sort; it tells you it is nothing of the sort; it tells you how much is paid; it tells you what is not paid; and then it goes on to say that the

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person who takes this share is to be "discharged from liability for all calls," which means that there is to be no liability on this share for the existing debt incurred in respect of it. The holder takes it free from any existing lien; he is not to be liable for the 10 per cent.; the call already made does not affect him. But the certificate tells him, in language which I do not say is so plain that it cannot be misunderstood, because evidently it has been misunderstood, that he has become the holder of a share not paid up in full. Now what is the liability of the man who takes that? It is to pay calls as and when they are made.

Then it is said, "You cannot make two calls." If you look at art. 4 you will see that the House is asked to put a construction upon it which has never been put on it yet, so far as I know, and which would not work in practice. What would be the result if under a certificate of this kind, or proceedings of this sort, the Randt Company were endeavouring to raise more than 5*s.* per share, I do not know; but that point has not arisen. I can conceive that there might be difficulties then. But, as I understand it, the Randt Company have given credit to the appellants for the money actually got from the previous call—therefore this difficulty does not arise. The Randt Company are not attempting by this machinery to raise more money per share than they were by the Act authorized to raise.

I have no doubt myself that the decision is quite right, and that this appeal ought to be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 25, 1904.

Solicitors: *Dale, Newman & Hood; Sanderson, Adkin, Lee & Eddis.*

[HOUSE OF LORDS.]

URBAN DISTRICT COUNCIL OF CATERHAM . . . . . } APPELLANTS;

AND

RURAL DISTRICT COUNCIL OF GODSTONE . . . . . } RESPONDENTS.

H. L. (E.) 1904 May 2.

Local Government—Creation of Urban District—Subtraction of Parish from Rural District—Highway Expenses—Loss of Income—Matter requiring Adjustment—Local Government Act, 1888 (*c.* 41), *ss.* 57, 62—*Local Government Act*, 1894 (*c.* 73), *ss.* 54, 68.

By order of a county council under s. 57 of the Local Government Act, 1888, a parish which was part of a rural district was separated from that district and made an urban district, and the parish ceased to be rated for the highway expenses of the rural district:—

Held, that the loss of this contribution was not a matter which required to be adjusted between the rural district and the new urban district under s. 62 of the Local Government Act, 1888. That section does not give compensation for any such loss of profit. The word "income" in s. 62 means existing income, and does not include income which may afterwards be derived from making rates.

The decision of the Court of Appeal, [1903] 1 K. B. 554, reversed.

In re Rochdale Union and Haslingden Union, [1899] 1 Q. B. 540, and *Bucks County Council and Herts County Council*, [1899] 1 Q. B. 515, overruled on the above point.

In 1898 the Surrey County Council under the Local Government Acts, 1888 and 1894, made an order constituting the parish of Caterham a special urban district. Thenceforth the parish ceased to form part of the Godstone Rural District, as it previously had. The Godstone Rural District claimed an arbitration to adjust matters between itself and the urban district of Caterham under s. 62 of the Local Government Act of 1888, and proposed to prove that for the three years preceding 1899 it had received from rates levied in Caterham parish for highway purposes a sum much larger than the sum spent by the rural district in respect of highways in the parish, and proposed to claim 36,028*l.* 7*s.* 6*d.* as their loss.

The arbitrator having stated a special case for the opinion

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of the Court, Wright J. held that the Godstone Rural District was entitled to have its claim adjusted, and this decision was affirmed by the Court of Appeal (Vaughan Williams, Stirling, and Mathew L.JJ.). (1) Hence this appeal.

April 22, 26. *Bray, K.C.*, and *Shearman, K.C.*, for the appellants. Sect. 62 does not give compensation in terms for loss of profit, and no such result will be implied. It needs express words, and there are none.

C. A. Russell, K.C., and *G. Humphreys*, for the respondents, relied on the decisions in the *Rochdale Case* (2) and the *Bucks Case* (3), and the reasons there given.

The House took time for consideration.

May 2. EARL OF HALSBURY L.C. My Lords, I am of opinion in this case that the judgment of the Appeal Court and of Wright J. should be reversed; but in truth, though the question arises in this case, it is really the decision in the case of the *Rochdale Union* (2) which is here under appeal. There seems to have been some misapprehension about that decision. Lord Russell commences his judgment by saying that he agrees with the judgment of Channell J. "substantially," and entirely in the principle involved in it; but upon the point now in debate the judgment of Channell J. and Ridley J., who entirely agreed with him, was the other way.

The language of the section now under construction does not seem to me to be appropriate to the compensation of one district for being placed in a less advantageous financial position than before the alteration in its boundaries. This is language which the Legislature has used elsewhere when what is now contended for was contemplated by the Legislature, but I do not think that the 62nd section ever contemplated "adjustment" as being applicable to such a state of things as has been brought about by a diminution of rateable area. Where two areas are being divided and each becomes respon-

(1) [1903] 1 K. B. 554. (2) [1899] 1 Q. B. 540.
(3) [1899] 1 Q. B. 515.

sible for its own administration, and where previously they possessed property, it is obvious enough that they must have some mode of adjusting the division of the property which each possessed prior to such separation—the buildings, for example, the workhouses for the administration of the poor law—and, to quote the language of the section, "property, income, debts, liabilities, and expenses." The only word within which the present claim can be embraced is the word "income." Now it may be conceded that in a loose mode of speech the capacity for being rated for future liabilities might be so described, but it would not be accurate. And it is not with the word itself alone that one has to deal, but with the word associated, as it is here, with the words "property, debts, liabilities, and expenses." I cannot think that the Legislature intended so grave a departure from the general and very obvious meaning of the words that it has actually used. Where it did intend to allow compensation to be given—compensation, be it observed, not adjustment—it has shewn that it can use appropriate and express words for the purpose, and the words "property and income from property" can well be satisfied by a division of property and income resulting from property, without importing the element of compensation for loss of income. Even if the word "income" itself were appropriately used I think the word "adjustment," as distinguished from "compensation," means a division of existing assets, while "compensation" would quite rightly be interpreted to mean the loss of some right to obtain income by rating, or of some area which would furnish the right to get income. But it seems to me quite contrary to principle, in the case of an alteration of boundaries applicable to a municipal body which is to be for the future self-sufficing, to make the adjustment of its "property and income, debts and liabilities" a subject of compensating arrangements. Of course, if the Legislature has done so it must be acquiesced in, but I entirely dissent from the idea of presuming that this has been done without express words.

For these reasons it seems to me that the judgment appealed from ought to be reversed, and I so move your Lordships.

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LORD DAVEY. My Lords, the question to be determined in this appeal was thus stated by Vaughan Williams L.J.: "It is said," he observes, "that by reason of the separation of the parish of Caterham from the Godstone Rural District, the council of that district will lose the profit which they formerly derived from the contributions of the parish of Caterham"; and the question, he added, was whether that apprehended loss was matter for adjustment pursuant to the provisions of s. 62 of the Local Government Act of 1888. Mr. Russell disclaimed stating the question in that way. But I think that the Lord Justice accurately described the claim which is put forward by the respondents. What they are seeking is not an adjustment in the ordinary sense of that word of common property or liabilities or of any reciprocal liabilities of Caterham and Godstone towards each other, but compensation for a loss which they apprehend they will suffer by the severance of Caterham from the Godstone Rural District. I do not assume that the arbitrator, if he should be required to proceed with the matter, would award to the respondents the full amount of the extravagant claim put forward by them (the respondents), and I refer to that claim only as shewing the true nature of their demand.

The first observation that occurs to one is that s. 62 says nothing about compensation for apprehended loss of profit or injury. Your Lordships are familiar with Acts of Parliament which give a right to compensation to persons injuriously affected by the exercise of statutory powers, and one would have expected that, if that was the meaning of the Act, it would have been expressed in plain terms. Local authorities are by the section in question authorized to make agreements for the purpose of adjusting "any property, income, debts, liabilities, and expenses." The primâ facie meaning of those words is to give powers or facilities for adjusting any matters which by reason of the Act, or a scheme made under it, require adjustment. In the following words the expression is altered. The section goes on to say (reading it short) that any agreement authorized by the Act to be made "for the purpose of the adjustment of any property, debts, liabilities, or financial relations,"

may provide for the transfer or retention of any property, debts, or liabilities, or for the joint use of any property, and for the transfer of any duties, and for payment by either party to the agreement in respect of property, debts, duties, and liabilities so transferred or retained, or of such joint user, or in respect of the salary, remuneration, or compensation payable to any officer or person. I have troubled your Lordships by reading the section at length because the latter words, in my opinion, confirm the primâ facie meaning which I attached to the earlier words. It must be admitted, I think, that the property, debts, or liabilities to be retained or transferred must mean existing property or debts or a liability actually incurred, and the expression "financial relations," I think, also refers to any reciprocal financial obligations which the undivided district and the severed portion may have already incurred towards each other.

I construe the words "income" and "expenses" in the same manner. I think that "income" means income presently enjoyed or to which there is a present title, and does not include income which may hereafter be derived from the making of rates. There may be income derived from property which is held on trust for the district, or some income such, for example, as a rent-charge or other annual payment applicable under some charitable trust or otherwise to the benefit of the district or relief of the ratepayers in it. I think the words would also include the proceeds of any rate already made on the whole district. It is true that "income" in this sense would strictly be included under the general word "property," and that is perhaps the reason why the word is dropped out in the subsequent enumeration of matters of adjustment.

I am therefore of opinion that the words of the section do not necessarily or according to their proper construction confer any such right as is claimed in this litigation. But, my Lords, I think the case may be put on a broader principle. The very object of the scheme which has been made under s. 57 of the Act is to enable the present appellants to rate their own district and expend the rates so raised for the exclusive benefit of their own district. In fact, when one speaks of the severance of an administrative unit, it is only a compendious way of expressing

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this result. That the rates derived from the severed district will be lost to the district from which it is severed is the inevitable consequence and intention of putting the Act in force; and if this were intended by the Legislature to be a matter for compensation, some words should be found in the Act which confer the right to such compensation. Adjustment seems to me a different idea from compensation. When a severance takes place of an administrative unit some adjustment is necessary. There are, or may be, common property or income, debts, liabilities, or expenses owing or incurred by or on behalf of the undivided area. These matters require adjustment, and s. 62 appears to me to be nothing more than a procedure section for enabling such matters to be adjusted. But the respondents have no vested interest in the profit to be derived from the Caterham highway rates after severance, and there is no abstract right of either of the parties to be compensated by the other for any future financial detriment arising from acts directed or authorized by the Legislature, and, in my opinion, there is nothing in the Act which creates such a right.

I am therefore of opinion that the appeal should be allowed. It follows from what I have said that I think the cases of the *Rochdale Union* (1) and *Bucks County Council* (2) were wrongly decided and should be overruled.

LORD JAMES OF HEREFORD. My Lords, in this case I agree with the opinions already expressed that the judgment of the Court of Appeal should be reversed, for I concur in the view that the loss of a portion of a ratepaying area does not support a claim for an adjustment of "property, income, debts, liabilities, or expenses," within the meaning of s. 62 of the Local Government Act, 1888. It seems to me that the separation of a portion of an area within which a rate has been levied cannot occasion a loss of "income" within the meaning of the section to the remaining portion of the area; nor can such change in the existence of the rateable area occasion any claim for adjustment under the word "liability." Both of

(1) [1899] 1 Q. B. 540. (2) [1899] 1 Q. B. 515.

these words, "income" and "liabilities," must be read as referring to ascertained and existing income and liabilities, and cannot be held to include the mere liability to be rated if the order of division had not been made.

It may be that the application of this view may in some cases confer on one portion of a divided area substantial advantage at the expense of another portion. But if such gain or loss would amount to injustice it may be that the remedy is to be found by objecting to the order being made by the county council under s. 57 of the Act, or to its confirmation by the Local Government Board.

LORD ROBERTSON. My Lords, I am very clearly of the same opinion. I do not think that the claim of the respondents comes within s. 62; and when I say so I mean, not merely that the word "adjust" and the other phrases used are not appropriate to cover it, but that the claim is in its nature and substance altogether heterogeneous to the things contemplated, and is outside the scheme of setting up new authorities as stated in the Act. It must be remembered that when, under s. 62, Caterham and Godstone proceed to "adjust" (whatever that means) they meet as separate and self-contained rating authorities, Caterham having been, by deliberate statutory proceeding, vested with the full and exclusive power of rating, for its own uses, within the boundaries assigned to it, and Godstone, while retaining its old name, having a different and smaller jurisdiction compared to that which formerly existed. The direct and necessary result of setting up Caterham as an urban district is to establish not merely one but two new rating units, namely, Caterham and the lesser Godstone. The rating in each is necessarily on the new basis of the new area; and it would be merely an accident if the rates in the two areas were the same after as before the separation. Now the assumption, and what I must venture to call the fallacy, of the judgments under review is that the Legislature intended that the two new bodies should set about what Bruce J. calls "restoring the true balance"—that is to say, the former balance of rates. I see no warrant for any such assumption. On the contrary, I should

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suppose that in some cases at least one of the reasons why a new urban district is set up is because the rating is unfair, and would be made more equitable by dividing the rating area into two. The inhabitants of some proposed new district (I am not for the moment speaking of Caterham) may very well say that they, having grown into a self-contained community, are made to pay for things they have no interest in, and, because of their large valuation, are paying more than the people who are interested in them. All these considerations and the like, pro and con, are for the county council and the Local Government Board.

But the *Rochdale Case* (1) and the *Bucks Case* (2) depend upon the view that in the matter of rates the status quo before the order is to be treated as the standard of right after the order, and that any detriment on the one side and advantage on the other, caused by the independence of the new district, are to be redressed by adjustment. I see no trace of an intention thus to stereotype by compensation the results of a system of rating which ex hypothesi has ceased. Of course it is quite conceivable that the Legislature might have made it a condition of the setting up of a new rating body that it should purchase its independence, and might have taken the financial position in the year of independence as fixing the price. But this is an idea unexpressed in the statute and remote from the simple one expressed in s. 62, which, primarily at least, deals with extant things and extant liabilities which, belonging to the undivided community, must perforce be divided, now that the community is broken up and the partners are taking with them what belongs to them. And the difficulty of applying the words of s. 62 to a claim of compensation becomes, as I think, an impossibility, when the nature of the claim is clearly realized.

I have read with care all the judgments in the previous cases. In the *Rochdale Case* (1) and in the *Bucks Case* (2) the principle laid down is that which I have already referred to, that the "true balance," meaning thereby the existing balance at the date of separation, must be "restored." This is most

(1) [1899] 1 Q. B. 540. (2) [1899] 1 Q. B. 515.

clearly shewn in Bruce J.'s judgment in the *Bucks Case* (1) and in A. L. Smith L.J.'s in the *Rochdale Case*. (2) It is significant that all subsequent judicial opinions have been based on the authority of these cases, and that in none has this principle been independently reasserted.

Order of the Court of Appeal and order of Wright J. reversed with costs here and below.

Lords' Journals, May 2, 1904.

Solicitors: *F. B. Winter; Cooper, Turner & Evans, for Evelyn A. Head, East Grinstead.*

[HOUSE OF LORDS.]

COLLS . . . . . APPELLANT;

AND

HOME AND COLONIAL STORES, LIMITED . . . . . RESPONDENTS.

Ancient Lights—Prescription—Substantial Interference—Nuisance—Damage—Measure of Right—Angle of 45 Degrees—Mandatory Injunction—Inquiry as to Damage, Refusal of.

To constitute an actionable obstruction of ancient lights it is not enough that the light is less than before. There must be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and (in the case of business premises) to prevent the plaintiff from carrying on his business as beneficially as before.

The nature of the right to light and of an infringement was not altered by the Prescription Act (2 & 3 Will. 4, c. 71).

The decision of the Court of Appeal, [1902] 1 Ch. 302, reversed, and the decision of Joyce J. restored.

The decision of the Court of Appeal in *Warren* v. *Brown*, [1902] 1 K. B. 15, overruled.

THE respondents were the lessees of a building in Worship Street, Shoreditch, in which they carried on their business. The appellant proposed to build on land on the opposite side

(1) [1899] 1 Q. B. at p. 527. (2) [1899] 1 Q. B. at p. 545.

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of Worship Street (which was 41 ft. wide), at No. 44, a building 42 ft. high, which the respondents believed would obstruct their light, and they brought an action against the appellant for an injunction. The action was tried by Joyce J., who found that the proposed building would not materially interfere with the access of light to any windows of the respondents except two windows on the ground floor. These windows were two out of five windows facing Worship Street in a room used by the respondents as an office for clerks, 11 ft. 10 in. in height, 50 ft. deep from the windows to the back of the room, and without any window at the back. It had been the practice to use electric light in the back part of the room, and practically it was necessary to do so even in the daytime. The proposed building would not affect the selling or letting value of the respondents' premises, and they would be still sufficiently lighted for all ordinary purposes of occupancy as a place of business. Joyce J. dismissed the action with costs. This decision was reversed by the Court of Appeal (Vaughan Williams, Romer, and Cozens-Hardy L.JJ.), who granted an injunction to restrain the appellant from building so as to darken, injure, or obstruct any of the respondents' ancient lights or windows as they were enjoyed previously to the taking down of the old building at 44, Worship Street, with an order to pull down all the building which had been so built as to darken, &c. (1) Between the decision of Joyce J. and the decision of the Court of Appeal the appellant had put up his proposed building.

This appeal was twice argued: first, on May 15, 18, 19, 22, before the Earl of Halsbury L.C. and Lords Shand, Davey, and Robertson; and, secondly, on December 8, 10, 11, 1903, before the same noble and learned Lords, with the addition of Lords Macnaghten and Lindley. Lord Shand died before judgment was delivered.

Bray, K.C., and *Leigh Clare* (*A. B. Nutter* with them), for the appellant. The law as laid down by the oldest and best authorities is that to constitute an infringement of the right

(1) [1902] 1 Ch. 302.

to light there must be what amounts to a nuisance—a real injury—enough to make the house uncomfortable and to prevent the business from being carried on as beneficially as before. All the decisions and dicta which conflict with this principle (and there are many) are departures from the true test, are bad law and should be overruled.

[The learned counsel cited and discussed every relevant reported decision down to the present time. All the material ones are amply dealt with in the judgments here and for the most part in the judgment of Wright J. in *Warren* v. *Brown*. (1)]

Haldane, K.C., and *Hughes, K.C.* (*W. E. Vernon* with them), for the respondents. Uninterrupted enjoyment for twenty years of the natural light from the sky gives a right to an action for obstructing that light, or an injunction in restraint.

[LORD ROBERTSON. Can a man by making one window where there should be five to give proper light, and living twenty years in this cave, prevent his neighbour from building a house which would have done no harm to the light if there had been five windows?]

Yes. The owner of the dominant tenement cannot be compelled to use electric or any artificial light: he is entitled to require the sunlight. Here the light was substantially less comfortable and enjoyable.

[The learned counsel relied on the decisions which must now be considered as bad law, including *Warren* v. *Brown* (2) in the Court of Appeal.]

Bray, K.C., in reply.

The House took time for consideration.

May 2. EARL OF HALSBURY L.C. My Lords, in this case, which was tried before Joyce J., the learned judge gave judgment for the defendant upon the ground that the plaintiffs had failed to prove any actionable wrong although he found that the erection of the buildings of which the plaintiffs complained

(1) [1900] 2 Q. B. 722. (2) [1902] 1 K. B. 15.

H. L. (E.) 1904 COLLS v. HOME AND COLONIAL STORES, LIMITED. Earl of Halsbury L.C.

had appreciably diminished the light which the plaintiffs had previously enjoyed.

The Court of Appeal, as I understand their judgment, thought this was wrong, and ordered a mandatory injunction to pull the premises down, so as to restore all the light that had been previously enjoyed. If this principle should be sanctioned by your Lordships it would be for the first time that, in this House at all events, such a principle had been determined. I do not deny that authorities may be found for it, some of which have been cited at the bar, but I do not think that the exact question which is now in debate has ever been brought before this House until now.

The question may be very simply stated thus: after an enjoyment of light for twenty years, or if the question arose before the Act for such a period as would justify the presumption of a lost grant, would the owner of the tenement in respect of which such enjoyment had been possessed be entitled to *all* the light without any diminution whatsoever at the end of such a period?

My Lords, if that were the law it would be very far-reaching in its consequences, and the application of it to its strict logical conclusion would render it almost impossible for towns to grow, and would formidably restrict the rights of people to utilise their own land. Strictly applied, it would undoubtedly prevent many buildings which have hitherto been admitted to be too far removed from others to be actionable, but if the broad proposition which underlies the judgment of the Court of Appeal be true, it is not a question of 45 degrees, but any appreciable diminution of light which has been enjoyed (that is to say, has existed uninterruptedly for twenty years) constitutes a right of action, and gives a right to the proprietor of a tenement that has had this enjoyment to prevent his neighbour building on his own land.

My Lords, I do not think this is the law. The argument seems to me to rest upon a false analogy, as though the access to and enjoyment of light constituted a sort of proprietary right in the light itself. Light, like air, is the common property of all, or, to speak more accurately, it is the common

right of all to enjoy it, but it is the exclusive property of none. If the same proposition against which I am protesting could be maintained in respect of air the progressive building of any town would be impossible. The access of air is undoubtedly interfered with by the buildings which are being built every day round London. The difference between the town and country is very appreciable to the dweller in cities when he goes to the open country, or to the top of a mountain, or even a small hill in the country; but would the possessor for twenty years of a house on the edge of a town be at liberty to restrain his neighbour from building near him because he had enjoyed the free access of air without buildings near him for twenty years? No doubt this is an extreme case, but it is one of the extreme cases which tries the principle. The truth is that though there were objections to ask a jury whether the enjoyment talis qualis was such that they might presume a lost grant when nobody supposed that such a grant was ever really made, yet it gave the opportunity of considering what was the extent of the supposed grant, and, if anything so extreme as I have just supposed were claimed, no jurymen in their senses would have affirmed such a grant. The statute upon which reliance is placed in this case illustrates the danger of attempting to put a principle of law into the iron framework of a statute. The statute literally construed by the use of the words "*the* light" would mean all the light which for twenty years has existed in the surroundings of the tenement which has enjoyed it; yet, singularly enough, there has been a complete uniformity of decision upon the construction of the statute that it has made no difference in the right conferred, but is only concerned with the mode of proof; but, though I quite concur with this construction, which is supported by an overwhelming body of authority, yet I cannot but think the language of the statute has led to some of the decisions which your Lordships are now called upon to review.

Certainly, in the older decisions which have been brought to your Lordships' notice in Mr. Bray's very able argument, the proposition which, as I have said, underlies the judgment now under appeal, finds no place.

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Lord Hardwicke, long ago in 1752—*Fishmongers' Co.* v. *East India Co.* (1)—dealing with this very question, the alleged obstruction to light, laid down what I believe to be law to-day. "It is not sufficient," he said, "to say that it will alter the plaintiffs' lights, for then no vacant piece of ground could be built on in the city, and here there will be seventeen feet distance, and the law says it must be so near as to be a nuisance."

Lord Cranworth, in *Clarke* v. *Clark* (2), adopted the same test, and his observation, though a subsequent decision of his seemed to throw doubt upon it, has received the assent of some of the most learned judges who ever sat upon the English Bench.

I think that the whole subject has been confused by certain decisions which were dependent on the facts proved, and were incautiously reported as laying down principles of law, when they were, in my view, only intended to be findings of fact in that particular case. At all events, I am prepared to hold that the test given by Lord Hardwicke is the true one, and I do not think a better example could be found than the present case to shew to what extravagant results the other theory leads. The owner of a tenement on one side of a street forty feet wide seeks to restrain his opposite neighbour from erecting a room which, when erected, will not then be of the same height as the house belonging to the complaining neighbour, and the only plausible ground on which the complaint rests is that on the ground floor he has a room not built in the ordinary way of rooms in an ordinary dwelling-house, but built so that one long room goes through the whole width of the house to a back wall, a room which has no window at the back or sides, and which was, therefore, at the back of it, too dark for some purposes without the use of artificial light even before the building on the other side of the street was erected.

I think that no tribunal ought to find as a fact that the building is a nuisance, and, altogether apart from the inappropriateness of the remedy by injunction, I am of opinion that the plaintiffs have no cause of action against the defendant. The

(1) (1752) 1 Dick. 163. (2) (1865) L. R. 1 Ch. 16.

test of the right is, I think, whether the obstruction complained of is a nuisance, and, as it appears to me, the value of the test makes the amount of right acquired depend upon the surroundings and circumstances of light coming from other sources, as well as the question of the proximity of the premises complained of. What may be called the uncertainty of the test may also be described as its elasticity. A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell, and noise may give a cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it amounts to a nuisance which will give a right of action.

My Lords, I have not thought it necessary to enter into a discussion of the authorities, because I think it has been most carefully and accurately done by Wright J. in *Warren* v. *Brown*. (1)

Of course, my Lords, it must be taken that the foundation of this judgment rests upon the finding of fact by Joyce J., that the buildings of the defendant had not so materially interfered with the light previously enjoyed by the plaintiffs as to amount to a nuisance.

It follows that, in my judgment, the case of *Warren* v. *Brown* (1) was rightly decided by Wright J. and ought to have been affirmed by the Court of Appeal. It was, however, reversed (2) in accordance with the same views which guided that Court in the case now under review.

For the reasons I have given I have to move your Lordships that the judgment of the Court of Appeal be reversed, and the judgment of Joyce J. restored, and that the respondents do pay to the appellant the costs both here and below.

LORD MACNAGHTEN. My Lords, the right of a person who is owner or occupier of a building with windows, privileged as ancient lights, in regard to the protection of the light coming to those windows, is a purely legal right. It is an easement belonging to the class known as negative easements.

(1) [1900] 2 Q. B. 722. (2) [1902] 1 K. B. 15.

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It is nothing more or less than the right to prevent the owner or occupier of an adjoining tenement from building or placing on his own land anything which has the effect of illegally obstructing or obscuring the light of the dominant tenement. This right in early times was vindicated by an action on the case for nuisance—*Baten's Case* (1)—in which damages might be recovered and judgment had for removal or abatement of the nuisance. In *Aldred's Case* (2) Lord Coke says that an action lies for nuisance done to light as one of the three essential requisites of habitation. "An action lies," he says, "for hindrance of the light, for the ancient form of the action was significant, sc.— quod messuagium horridâ tenebritate obscuratum fuit." It was not every diminution of light that would support such an action. The form of the action itself shews that. In later times, when an action for the protection of ancient lights came to be regarded rather as an action for disturbance of an easement than an action grounded on nuisance—as an action to prevent the infringement of a right rather than an action to redress a wrong—the necessity of shewing the gravity of the injury complained of was not so obviously apparent. Still the principle was the same, and it must always be the same. "It is not sufficient," as Lord Hardwicke observed in *Fishmongers' Co.* v. *East India Co.* (3) "to say it will alter the plaintiffs' lights. . . . The law says it must be so near as to be a nuisance."

Probably the most satisfactory statement of the rule to be applied in all cases of ancient lights is to be found in *Back* v. *Stacey* (4) and *Parker* v. *Smith.* (5) *Back* v. *Stacey* (4) was an issue directed by the Lord Chancellor to try two questions: (1.) whether the ancient lights of the plaintiff in his dwelling-house in Norwich had been "illegally" obstructed by a building of the defendant, and (2.) if so, what damage the plaintiff had sustained in respect of the injury. So that if the jury had found that the obstruction complained of was an illegal obstruction the damages would have gone to the whole of the

(1) 9 Rep. 54 a.
(2) 9 Rep. 57 b.
(3) 1 Dick. 163.
(4) (1826) 2 C. & P. 465; 31 R. R. 679.
(5) (1832) 5 C. & P. 438; 38 R. R. 828.

injury, and not merely to the loss sustained up to the date of the writ. It was contended there that, as it was evident that the quantity of light previously enjoyed had been diminished, the plaintiff was at any rate entitled to a verdict on the first issue, any obstruction of ancient lights being illegal. But according to the report, "Chief Justice Best told the jury, who had viewed the premises, that they were to judge rather from their own ocular observation than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient lights had undergone. It was not sufficient to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before; nor that his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action, and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done. His Lordship added that it might be difficult to draw the line, but the jury must distinguish between a partial inconvenience and a real injury to the plaintiff in the enjoyment of the premises."

Back v. *Stacey* (1) was determined in 1826. *Parker* v. *Smith* (2) was heard during the sittings after Michaelmas Term, 1832. It is, I think, the earliest reported case dealing with the question of light after the passing of the Prescription Act, which came into operation on the first day of Michaelmas Term, 1832. It was tried before Tindal C.J. The marginal note states accurately, I think, the effect of the decision in these words: "That diminution of light and air which the law recognises as the ground of an action against a party who builds near another's premises is such as really makes them to a sensible degree less fit for the purposes of business or occupation." It does not seem to have been suggested either by the counsel or the judge that the Prescription Act had

(1) 2 C. & P. 465; 31 R. R. 679.

(2) 5 C. & P. 438; 38 R. R. 828.

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made the slightest alteration in the nature of the right to light or the principle on which the question of an alleged infringement of that right ought to be determined.

To these two cases I would only add the case of *Wells* v. *Ody* (1) before Parke B. in 1836. In his charge to the jury the learned judge said that he entirely adopted the law as laid down by Tindal C.J. in *Parker* v. *Smith*. (2) And then, after reading a passage from *Parker* v. *Smith* (2), he concluded his address to the jury by saying: "The question, therefore, which I shall leave to you is whether the effect of the defendant's building is to diminish the light and air so as sensibly to affect the occupation of the plaintiff's premises and make them less fit for occupation." So much for the right at law.

Courts of Equity had no original jurisdiction in the matter. Their province was simply to grant an injunction in aid of the legal right where there was danger of irreparable mischief, or where an injunction was required to prevent multiplicity of actions. Under Lord Cairns' Act (21 & 22 Vict. c. 27) the Court was empowered, in all cases in which it had jurisdiction to entertain an application for an injunction against the commission or continuance of any wrongful act, to award damages to the party injured, either in addition to or in substitution for such injunction. The Act commonly known as Sir John Rolt's Act (25 & 26 Vict. c. 42) provided that in all cases in which any relief or remedy within the jurisdiction of the Court of Chancery was sought, whether the title to such relief or remedy was or was not incident to or dependent upon a legal right, every question of law or fact cognisable in a Court of Common Law on the determination of which the title to such relief or remedy depended should be determined by or before the same Court. These Acts are superseded by the Judicature Act, and now the High Court has all the jurisdiction of the Court of Chancery and of the several Courts of law. But still, so far as the right in question is a legal right, the Court in the exercise of its jurisdiction must be guided by the principles established at law. And those principles, in my opinion, are

(1) (1836) 7 C. & P. 410.

(2) 5 C. & P. 438; 38 R. R. 828.

still to be found most clearly and most concisely exhibited in the cases before Best C.J. and Tindal C.J. to which I have already referred.

Although the question thus stated appears tolerably simple, it cannot be disputed that the reported cases on questions of light in recent times are not altogether consistent. There seem to be two divergent views, neither of which, I think, is absolutely accurate. The extreme view on one side is that the right which is acquired by so-called statutory prescription is a right to a continuance of the whole or substantially the whole quantity of light which has come to the windows during a period of twenty years. This view is conspicuous in *Calcraft* v. *Thompson* (1), before Lord Chelmsford L.C., and in *Scott* v. *Pape* (2), where Cotton L.J. speaks of a "cone of light" and Bowen L.J. of "a specific quantity of light" as a measure of the plaintiff's right. The extreme view on the other side is that the right is limited to a sufficient quantity of light for ordinary purposes.

I think this divergence of view comes from a difference of opinion, consciously or unconsciously entertained, as to the meaning and effect of the provisions of the Prescription Act (2 & 3 Will. 4, c. 71), and, if I am not mistaken, it may be traced to certain expressions, not perhaps sufficiently guarded, which are to be found in judgments delivered in this House in the case of *Tapling* v. *Jones*. (3) In that case Lord Westbury, Lord Cranworth, and Lord Chelmsford all assume that a period of twenty years' enjoyment of the access and use of light to a building creates an absolute and indefeasible right immediately on the expiration of the period of twenty years. No doubt s. 3 says so in terms, but s. 4 must be read in connection with s. 3; and if the two sections are read together, it will be seen that the period is not a period in gross, but a period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question. Unless and until the claim or matter is thus brought into question, no absolute or indefeasible

(1) (1867) 15 W. R. 387. (2) (1886) 31 Ch. D. 571.
(3) (1865) 11 H. L. C. 290.

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right can arise under the Act. There is what has been described as an inchoate right. The owner of the dominant tenement after twenty years' uninterrupted enjoyment is in a position to avail himself of the Act if his claim is brought into question. But in the meantime, however long the enjoyment may have been, his right is just the same, and the origin of his right is just the same as if the Act had never been passed. No title is as yet acquired under the Act. This point seems to have been much discussed shortly after the Act was passed. It was finally settled in a series of cases at common law, beginning, I think, with *Wright* v. *Williams* (1), and including *Richards* v. *Fry* (2) and *Cooper* v. *Hubbuck* (3), in which there is an interesting controversy between Willes J. and Williams L.J. on the question whether the twenty years' uninterrupted enjoyment under the 3rd section is the period of twenty years before any suit or action, or twenty years before each suit or action in which the point may from time to time arise. The former construction, in which Erle C.J. and Byles J. concurred with Willes J., eventually prevailed.

The question is of little or no practical importance. But the construction established by the series of decisions to which I have referred, in accordance with the express language of the statute, goes, I think, a long way to shew that the view taken by James L.J., Mellish L.J., and Lord Selborne as to the effect of the Act is absolutely correct, and that the qualification suggested by Bowen L.J. in *Scott* v. *Pape* (4) is not well founded. It certainly would be strange if the Court had been compelled to hold that the Prescription Act confers on a person whose right is questionable at least to this extent, that it has been actually brought into question, a higher and a larger right than that possessed by a person whose prescriptive claim to the enjoyment of light is so clear as to be beyond all question. The Act neither enlarges the right of the dominant tenement nor adds to the burthen of the servient tenement. Its effect is simply this: when the access and use of the light have been enjoyed for the full period which before the Act

(1) (1836) 1 M. & W. 77; 46 R. R. 265.
(2) (1838) 7 Ad. & E. 698; 45 R. R. 816.
(3) (1862) 12 C. B. (N.S.) 456.
(4) 31 Ch. D. 571.

was supposed to be sufficient to support a prescriptive claim and the right is then brought into question, it avoids and extinguishes every adverse plea not founded upon an agreement or consent in writing.

Now, if this be so, it seems to me, in accordance with the opinion expressed by James L.J. and Brett L.J. in *Ecclesiastical Commissioners* v. *Kino* (1), and by many other judges, that the direction given by Best C.J. in *Back* v. *Stacey* (2) is the direction which a Court exercising the functions of both judge and jury ought to keep steadily in view.

My Lords, having come to this conclusion, I do not propose to trouble your Lordships with any comments upon the mass of cases by which, in comparatively modern times, the question has been elucidated or obscured. It is enough, I think, to refer to what was said in *Kelk* v. *Pearson* (3), *City of London Brewery Co.* v. *Tennant* (4), and *Ecclesiastical Commissioners* v. *Kino*. (1) Speaking for myself, I doubt very much whether it is a profitable task to retry actions which depend simply on questions of fact, or to review and endeavour to reconcile or distinguish a number of cases that naturally enough contain some statements which, taken by themselves and apart from the context, may seem to be contradictory, but which must all proceed upon the same principle. It would only be another link in the embarrassing chain of authority, or, if I may venture to say so, only another handful of dust to be cast into one scale or the other when the claims of opposing litigants come to be weighed in the balance. I think there is much good sense in the observations of Brett L.J. in *Ecclesiastical Commissioners* v. *Kino*. (1) "To my mind," said his Lordship, "the taking of some expression of a judge used in deciding a question of fact as to his own view of some one fact being material on a particular occasion as laying down a rule of conduct for other judges in considering a similar state of facts in another case, is a false mode of treating authority. It appears to me that the view of a learned judge in a particular case as

(1) (1880) 14 Ch. D. 213.
(2) 2 C. & P. 465; 31 R. R. 679.
(3) (1871) L. R. 6 Ch. 809.
(4) (1878) L. R. 9 Ch. 212.

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to the value of a particular piece of evidence is of no use to other judges who have to determine a similar question of fact in other cases where there may be many different circumstances to be taken into consideration."

If I may trespass for a few minutes longer on your Lordships' attention, I would rather spend the time in making one or two practical suggestions. I do not put them forward as carrying any authority. But they may possibly be of use to those who have to try such questions as this, if and so far as they appear to be consistent with good sense.

It will be observed that in *Back* v. *Stacey* (1) the learned judge told the jury who had viewed the premises that they were to judge rather from their own ocular observation than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient light had undergone. Now a judge who exercises the functions of both judge and jury cannot be expected to view the premises himself, even if he considers himself an expert in such matters. But I have often wondered why the Court does not more frequently avail itself of the power of calling in a competent adviser to report to the Court upon the question. There are plenty of experienced surveyors accustomed to deal with large properties in London who might be trusted to make a perfectly fair and impartial report, subject, of course, to examination in Court if required. I am not in the least surprised that the plaintiffs in the present case objected to a report from a disinterested surveyor, but in my opinion the Court ought to have obtained such a report for its own guidance.

Then, with regard to giving damages in addition to or substitution for an injunction—that, no doubt, is a delicate matter. It is a matter for the discretion of the Court, and the discretion is a judicial discretion. It has been said that an injunction ought to be granted when substantial damages would be given at law. I have some difficulty in following out this rule. I observe that in some cases juries have been directed to give 1*s*. damages as a notice to the defendant to remove the obstruction complained of. And then, if the obstruction was not removed,

(1) 2 C. & P. 465; 31 R. R. 679.

in a subsequent action the damages were largely increased. In others a substantial sum has been awarded, to be reduced to nominal damages on removal of the obstruction. But the recovery of damages, whatever the amount may be, indicates a violation of right, and in former times, unless there were something special in the case, would have entitled the plaintiff as of course to an injunction in equity. I rather doubt whether the amount of the damages which may be supposed to be recoverable at law affords a satisfactory test. In some cases, of course, an injunction is necessary—if, for instance, the injury cannot fairly be compensated by money—if the defendant has acted in a high-handed manner—if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the Court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others. But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the Court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the Court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money. Often a person who is engaged in a large building scheme has to pay money right and left in order to avoid litigation, which will put him to even greater expense by delaying his proceedings. As far as my own experience goes, there is quite as much oppression on the part of those who invoke the assistance of the Court to protect some ancient lights, which they have never before considered of any great value, as there is on the part of those who are improving the neighbourhood by the erection of buildings that must necessarily to some extent interfere with the light of adjoining premises.

The common form of injunction which has been in use since the case of *Yates* v. *Jack* (1) is not, I think, altogether free

(1) (1866) L. R. 1 Ch. 295.

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from objection. I think it would be better that the order, when expressed in general terms, should restrain the defendant from erecting any building so as to cause a nuisance or illegal obstruction to the plaintiff's ancient windows, as the same existed previously to the taking down of the house which formerly stood on the site of the defendants' new buildings. If the action is brought to a hearing before the defendants' new buildings are completed, and there seems to be good ground for the plaintiff's apprehensions, an order, I think, might be conveniently made in that form with costs up to the hearing, and liberty to the plaintiff within a fixed time after completion to apply for further relief by way of mandatory injunction or damages, as he may be advised.

With the present case I may deal very briefly. It cannot be disputed that some diminution of light is caused by the defendants' buildings; but such as it is, I think, it is exactly what Best C.J. described as partial inconvenience rather than serious injury. I am satisfied that if the case had been tried at law, before the question was so much embarrassed by the multiplicity of decisions, no jury would have given any damages.

Perhaps I ought to add a word about *Warren* v. *Brown* (1), which is referred to in both the judgments below. I cannot say that that case is quite satisfactory to my mind either as dealt with in the Court of first instance or in the Court of Appeal. In the Court of first instance the learned judge who tried the case found a special verdict which is not very easy to understand. The room in which the light has been materially diminished "in its present state is," he says, "better lighted than the ground-floor front rooms in many of the principal streets." I do not see what bearing that fact had on the question at issue. Then, instead of keeping in view the direction which judges over and over again have said ought to be kept in view, the learned judge embarks on an inquiry to determine which of two extreme views is correct. I doubt whether either the one or the other can be accepted as a safe guide without qualification. The Court of Appeal, in their turn, instead of

(1) [1900] 2 Q. B. 722; C. A. [1902] 1 K. B. 15.

dealing with the facts of the case before them, combat a particular view which, rightly or wrongly, they attribute to Wright J. I do not think *Warren* v. *Brown* (1) helps one much.

I think the appeal ought to be allowed with costs here and below.

LORD DAVEY. My Lords, I am of opinion that the finding of the learned judge who tried this action as to the facts of this case is borne out by the evidence, and I accept his finding as the basis of my judgment. After describing the dimensions of the room on the ground floor of the plaintiffs' premises which is used as an office, Joyce J. says: "It is, I think, the result of the evidence that it has ordinarily, if not always, been the practice to make use of the electric light in the back part of the room, and a most extraordinary amount of light from the windows in Worship Street would be required to enable the use of the electric light in the back part of the room to be dispensed with, even on ordinary days. Practically, I think it may be taken that the use of electric light or some other artificial light is now and must always be necessary in order to light the back part of the room, even in the daytime. There is no evidence to shew that such an extraordinary amount of light has been enjoyed or acquired for anything like the period of twenty years. Probably the ground-floor rooms were reconstructed or rearranged as they now are within quite a recent period." And the learned judge sums up his finding in these words: "Apart from any question with respect to the back part of the plaintiffs' premises and to the extraordinary light required if it be possible to be obtained so far back in the absence of illumination by electric light, the plaintiffs' premises would still, in my opinion, after the erection of the defendant's building, be well and sufficiently lighted for all ordinary purposes of occupancy as a place of business. For all ordinary days they have amply sufficient light—at present they have abundance of light, and are in my opinion unusually well lighted. If, as it is contended on behalf of the plaintiffs, they

(1) [1900] 2 Q. B. 722; C. A. [1902] 1 K. B. 15.

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are entitled to the full amount of light now enjoyed without appreciable diminution, the plaintiffs would have a good cause of action upon the erection of the defendant's building, though it might perhaps be doubted whether the diminution that would be caused by the defendant's building if and when erected is sufficiently serious to entitle the plaintiffs to an injunction."

On these findings the learned judge, following the judgment of Wright J. in *Warren* v. *Brown* (1), which had not then been reversed by the Court of Appeal, held that the action failed and must be dismissed. The Court of Appeal reversed this judgment. The legal grounds of their judgment are contained in a single sentence. "If ancient lights," says Cozens-Hardy L.J., "are interfered with substantially, and real damage thereby ensues to tenant or owner, then that tenant or owner is entitled to relief." By the expression "interfered with substantially" I understand the Lord Justice to mean, "if the amount of light having access to the premises by means of the ancient lights is substantially diminished." This proposition appears to me to assume or imply that the owner of the dominant tenement is entitled to have the full amount of light which has gained access to the tenement by the ancient windows during the previous twenty years maintained without substantial diminution. The "real damage" may be occasioned by an alteration in the internal structure of the dominant tenement which has been made within the period of twenty years, or its adaptation within that period to some special use for which an extraordinary amount of light is required; but nevertheless, if the proposition be sound, the owner or occupier of the tenement is entitled to be protected in the enjoyment of the light required for his altered premises or for the special use to which he has put them. In perfect consistency with this view of the law, Vaughan Williams L.J. expressed a doubt whether the rule of 45 degrees can any longer be applied even as a rough measure.

The question for your Lordships to determine is whether this view of the law is correct, or, in other words, what is the true nature and extent in English law of the easement of light.

(1) [1900] 2 Q. B. 722.

It must be regretfully admitted that the numerous decisions on this subject in the Courts are not easily reconcilable, and are not infrequently contradictory. No judgment of this House has been referred to, except that in the case of *Tapling* v. *Jones* (1), the decision in which does not directly affect the point now before your Lordships. I do not propose to travel through the long catena of authorities. They were copiously referred to at the bar, and the principal cases are stated and carefully analyzed in the judgment of Wright J. in *Warren* v. *Brown*. (2)

My Lords, you will find that in the earlier authorities the obscuration of light to a tenement having ancient lights is dealt with on the footing of a nuisance. In *Aldred's Case* (3) the "hindrance of light" is treated in the same category as the nuisance of fouling the air by pigstyes. In *Fishmongers' Co.* v. *East India Co.* (4) Lord Hardwicke said: "As to the question whether the plaintiffs' messuage is an ancient building so as to entitle them to the right of the lights, and whether the plaintiffs' lights will be darkened, I will not determine it here, for if it clearly appeared that what the defendants are doing is what the law considers as a nuisance, I would put it in a way to be tried. . . . But I am of opinion that it is not a nuisance contrary to law, for it is not sufficient to say it will alter the plaintiffs' lights, for then no vacant piece of ground could be built on in the City, and here there will be seventeen feet distance, and the law says it must be so near as to be a nuisance. It is true the value of the plaintiffs' house may be reduced by rendering the prospect less pleasant, but that is no reason to hinder a man from building on his own ground."

Consistent with this view is the direction of Best C.J. to the jury in the case of *Back* v. *Stacey* (5), which it is not necessary for me to quote at length. In *Clarke* v. *Clark* (6) Lord Cranworth stated the question thus: "Whether the obstruction is such as to deprive the party of such a supply of light as he might reasonably calculate on enjoying." After saying

(1) 11 H. L. C. 290.
(2) [1900] 2 Q. B. 722.
(3) 9 Rep. 57 b.
(4) 1 Dick. 163.
(5) 2 C. & P. 465; 31 R. R. 679.
(6) L. R. 1 Ch. 16.

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that the plaintiff's rooms were rendered less cheerful, he adds: "But I cannot think that this is such an obstruction of light as to amount to a nuisance . . . . What the plaintiff is bound to shew is that the buildings cause such an obstruction of light as to interfere with the ordinary occupations of life." In *Robson* v. *Whittingham* (1), decided in the following year, Knight Bruce and Turner L.JJ. expressed themselves as entirely satisfied with Lord Cranworth's judgment, and Turner L.J. accentuated his approval by saying that he thought this class of cases had been carried too far before the decision in *Clarke* v. *Clark* (2) was pronounced. Nothing that I can say will add to the respect and authority which the opinions of those two learned and experienced judges must command with your Lordships.

It has been thought that the 3rd section of the Prescription Act (2 & 3 Will. 4, c. 71) altered substantially the previously existing law as to ancient lights, and had the effect of conferring on the owner of the dominant tenement, by twenty years' enjoyment, an absolute and indefeasible right to the full amount of the light enjoyed during that period. And it must be admitted that the language of the section lends some plausibility to that opinion. It is, however, not consistent with the language of Lord Cranworth in *Clarke* v. *Clark* (2), and the point was expressly determined by James and Mellish L.JJ. in *Kelk* v. *Pearson* (3), decided by them in the year 1871.

James L.J. there says: "I am of opinion that the statute has in no degree whatever altered the pre-existing law as to the nature and extent of this right. The nature and extent of the right before that statute was to have that amount of light through the windows of a house which was sufficient according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, or for the beneficial use and occupation of the house if it were a warehouse, shop, or other place of business. That was the extent of the easement, a right to prevent your neighbour

(1) (1866) L. R. 1 Ch. 442. (2) L. R. 1 Ch. 16.
(3) L. R. 6 Ch. 809.

from building on his land so as to obstruct the access of sufficient light and air to such an extent as to render the house substantially less comfortable and convenient." The statute, in fact, has only altered the conditions or length of user by which the right may be acquired, but not the nature of the right.

In the case of the *City of London Brewery Co.* v. *Tennant* (1), Lord Selborne expressed his complete adherence to the view of the law taken in the case of *Kelk* v. *Pearson* (2), "correcting some impressions which might have arisen from the language used in former cases by some learned judges." This doctrine, however, has not been unchallenged. In an Irish case of *Mackey* v. *Scottish Widows' Society* (3), decided in 1877, Christian L.J. criticized in vigorous language the judgments of James L.J. and Lord Selborne, and held that the right is to an average maximum of the light which nature has been shedding upon the window for twenty years before the defendant interrupted it. It is also difficult to reconcile the language used by Cotton and Bowen L.JJ. in the case of *Scott* v. *Pape* (4), or the language of the Queen's Bench judges in *Moore* v. *Hall* (5), with the decision in *Kelk* v. *Pearson* (2) and *City of London Brewery Co.* v. *Tennant* (1), though the authority of those cases was not in terms questioned by them.

My Lords, I regard the decisions in *Kelk* v. *Pearson* (2) and the *City of London Brewery Co.* v. *Tennant* (1) as complementary to, and on the same lines with, Lord Cranworth's judgment in *Clarke* v. *Clark*. (6) And so regarding it, I entirely approve of it. Romer L.J., however, in delivering the judgment of the Court in *Warren* v. *Brown* (7) seems to have taken a different view of the effect of *Kelk* v. *Pearson*. (2) He says: "Since *Kelk* v. *Pearson* (2) it is impossible to hold properly that the statutory right is not interfered with merely because after the interference the house comes up to a supposed standard as to what a house ordinarily requires by way of light

(1) L. R. 9 Ch. 212.
(2) L. R. 6 Ch. 809.
(3) (1877) Ir. Rep. 11 Eq. 541.
(4) 31 Ch. D. 554.
(5) (1878) 3 Q. B. D. 178.
(6) L. R. 1 Ch. 16.
(7) [1902] 1 K. B. 15.

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for purposes of inhabitancy or business," and he quotes some words used by Mellish L.J. at p. 814 of the report.

I must remark that the particular point which was under discussion in *Warren* v. *Brown* (1), and in another form in the present case, was not before the Court in *Kelk* v. *Pearson*. (2) There was no question there of a claim for protection in the use of an extraordinary amount of light required for some special purpose, or required by some unusual peculiarity in the internal structure of the building. And I regard what was said by Mellish L.J. as directed to the arguments addressed to the Court in that case. According to any standard short of holding that the right is to all the light which has come through the window, the right to light has a ragged edge to it, and it is impossible to assert that any man has a right to a fixed amount of light ascertainable by metes and bounds. I do not think that Mellish L.J. intended to differ from James L.J., and in the *City of London Brewery Co.* v. *Tennant* (3), when James L.J. repeated the substance of what he had said in the earlier case, Mellish L.J., according to the report, contented himself with a simple concurrence.

My Lords, I must trespass on your indulgence for a few moments by adverting to an impression which has been entertained by some distinguished judges, and was the subject of argument at the bar, to the effect that within the space of a few months Lord Cranworth overruled himself. The judgment in *Clarke* v. *Clark* (4) was delivered on November 25, 1865, and that in *Yates* v. *Jack* (5) was delivered on March 24, 1866. It was thought by Lord Chelmsford in *Calcraft* v. *Thompson* (6) that the effect of the later case was to hold the dominant tenement entitled to the whole light that had previously been enjoyed, and Wood V.-C. in *Dent* v. *Auction Mart Co.* (7) to a certain extent shared the same impression. There is not a hint in the judgment in *Yates* v. *Jack* (5) which indicates that Lord Cranworth thought he was depart-

(1) [1902] 1 K. B. 15.
(2) L. R. 6 Ch. 809.
(3) L. R. 9 Ch. 212.
(4) L. R. 1 Ch. 16.
(5) L. R. 1 Ch. 295.
(6) 15 W. R. 387.
(7) (1866) L. R. 2 Eq. 238.

ing from the law as laid down in his earlier judgment. Both cases were decided and probably reported before *Robson* v. *Whittingham* (1); but the Lord Justices, as we have seen, adopted *Clarke* v. *Clark* (2) as an authority which had their approval. And if the question at issue in *Yates* v. *Jack* (3) be looked at, it will be seen that the argument to which Lord Cranworth's judgment was directed was that it was not necessary for the plaintiffs to have the ordinary quantity of light because the business which they were carrying on required a diminished quantity only. That was the argument to which Lord Cranworth could not accede. So understood, and reading it by the light of *Clarke* v. *Clark* (2), I do not dissent from the language used by Lord Cranworth in *Yates* v. *Jack* (3): "The right conferred by the statute is an absolutely indefeasible right to the enjoyment of the light without reference to the purposes for which it has been used." Your Lordships were told, and my experience at the bar confirms it, that the order made in *Yates* v. *Jack* (3) has been adopted as a common form of order in cases of this description. I think this is unfortunate. It was a very proper order to make in that case, and in nineteen cases out of twenty, or perhaps ninety-nine out of one hundred, where no question arises such as that in the present case, it would be sufficient and appropriate. But it is an erroneous proceeding to deduce an absolute rule of law from the form of an order made in a particular case.

In *Lanfranchi* v. *Mackenzie* (4) Malins V.-C. held that a person could not, by using the dominant tenement for a period less than twenty years for some special purpose requiring an extraordinary amount of light in excess of what was required for the ordinary purposes of inhabitancy or business, entitle himself to protection for such extraordinary requirements, and thereby impose an additional restriction on his neighbour's use of his own land. In that case, as in the present one, it was not proved that the extraordinary amount of light had been used for twenty years. "No man," said the Vice-Chancellor,

(1) L. R. 1 Ch. 442.
(2) L. R. 1 Ch. 16.
(3) L. R. 1 Ch. 295.
(4) (1867) L. R. 4 Eq. 421.

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quoting the words of another judge, "can by any act of his own suddenly impose a new restriction on his neighbour." In their judgment in *Warren* v. *Brown* (1) the Court of Appeal dissented from this decision, and their opinion was a logical conclusion from the views which they expressed as to the nature and extent of the easement. My Lords, I do not concur with the opinion of the Court of Appeal, for I think that the case of *Lanfranchi* v. *Mackenzie* (2) was rightly decided. I agree with the Vice-Chancellor that it would be contrary to the principles of the law relating to easements that the burden on the servient tenement should be increased or varied from time to time at the will of the owner of the dominant tenement. The easement is for access of light to the building, and if the building retains its substantial identity, or if the ancient lights retain their substantial identity, it does not seem to me to depend on the use which is made of the chambers in it, or to be varied by any alteration which may be made in the internal structure of it. I do not propose to discuss at length the question how far a variation in a tenement will destroy an easement appurtenant to it. The law on that subject is as old as *Luttrel's Case*. (3)

In the case of *Martin* v. *Goble* (4) a malthouse had been converted into a workhouse, and it was held that the house was entitled to the degree of light necessary for a malthouse, not for a dwelling-house. That case has been the subject of much criticism, and I think that some judges have thought that the language of the Lord Chief Baron had a wider scope than it was intended to have. Following the suggestion of Wood V.-C., it may be supported on the ground that (to use the language of *Luttrel's Case* (3)) the alteration affected the substance and not only the quality of the tenement.

But while agreeing that a person does not lose his easement by any change in the internal structure of his building or the use to which it is put, and that regard may be had, not only to the present use, but also to any ordinary uses to which the tenement is adapted, I think it is quite another question whether he is entitled to be protected at the expense of his

(1) [1902] 1 K. B. 15, at p. 24.
(2) L. R. 4 Eq. 421.
(3) 4 Rep. 86 a.
(4) (1808) 1 Camp. 320.

neighbour in the enjoyment of the light for some special or extraordinary purpose. It is agreed on all hands that a man does not lose or restrict his right to light by non-user of his ancient lights, or by not using the full measure of light which the law permits. If that measure be by common law or by the statute the whole amount of light which has had access to his windows, cadit quæstio. But if this view of the law be not accepted, you must introduce that "supposed standard" which Romer L.J. repudiates. If the actual user is not the test where the use falls below the standard of what may reasonably be required for the ordinary uses of inhabitancy and business, why (it may be asked) should it be made a test where the use has been of a special or extraordinary character in excess of that standard? It does seem to me unreasonable to hold that where a man for his own convenience or profit converts two or more rooms of his house into one without making provision for lighting them, or converts a portion of his house into a photographic studio, or puts it to some similar purpose, he can suddenly call upon his neighbour to leave him a supply of light which is rendered necessary only by such alterations, and thereby impose what is in substance and in truth an increased burden on his neighbour. If the action be brought a month before the change it would be dismissed. If it be brought a month afterwards an injunction would be granted. I am of opinion that the Courts have gone too far in this question of lights, and have imposed undue restrictions on persons in the exercise of their lawful right to build on their own land.

In the second argument before your Lordships the leading counsel for the respondents contended that his clients had for more than twenty years enjoyed the access of light over the appellant's land to their ground-floor office in its present condition. I believe that all your Lordships are agreed with Joyce J. that there is no proof to support such a contention. The fact relied on was not put in issue at the trial, and the evidence was not directed to it. If the plaintiffs had intended to claim and rely on a special easement of that description, it was for them to state their claim and prove the facts to support

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it. It is unnecessary to say, therefore, whether such a claim would be good in law. Malins V.-C. thought it could be sustained if the special user was had with the knowledge of the owner of the servient tenement. I will only say that I see some difficulties in the way, and reserve my opinion.

My Lords, I must apologise for the length at which I have trespassed on your attention. According to both principle and authority, I am of opinion that the owner or occupier of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind, and that the question for what purpose he has thought fit to use that light, or the mode in which he finds it convenient to arrange the internal structure of his tenement, does not affect the question. The actual user will neither increase nor diminish the right. The single question in these cases is still what it was in the days of Lord Hardwicke and Lord Eldon—whether the obstruction complained of is a nuisance. I do not myself think that this rule is difficult of application in practice. In the majority of cases no such questions as those which have been raised in *Warren* v. *Brown* (1) and the present case occur. The experience of surveyors who are practically conversant with this matter is entitled to great respect. As Mr. Vigers states in his evidence, they have adopted a working rule for the purpose of advising those who consult them and settling differences by negotiation. The rule of 45 degrees is not, of course, a rule of law, and is not applicable to every case. But I agree with Lord Selborne (*City of London Brewery Co.* v. *Tennant* (2)) that it may properly be used as primâ facie evidence.

For these reasons I think that the appeal should be allowed, and the decree of Joyce J. restored with costs here and below.

LORD ROBERTSON. My Lords, I agree in the judgment which my noble and learned friend (Lord Davey) has just delivered.

(1) [1900] 2 Q. B. 722. (2) L. R. 9 Ch. 212, at p. 220.

LORD LINDLEY. My Lords, Joyce J., who tried this case and was asked to grant an injunction before the defendant's buildings had been erected, considered that although the buildings would sensibly diminish the plaintiff's light, the diminution would not materially affect his comfort or convenience, and would not be sufficient to entitle the plaintiffs to any relief, and he dismissed their action. The Court of Appeal, however, took a different view, and granted a mandatory injunction ordering the defendant to pull down part of his building which had been completed after the injunction had been refused. Hence the appeal to your Lordships.

The language of s. 3 of the Prescription Act (2 & 3 Will. 4, c. 71) shews that in order to acquire a right to a light there must be—(1.) Access and use of light, not access alone. Access here is understood to refer to free passage of light over the servient tenement (see per Fry L.J. in 31 Ch. D. p. 575, and per Kay J. in 40 Ch. D. 26). (2.) Such access and use must be to and for some dwelling-house, workshop, or other building (as to which see *Harris* v. *De Pinna*). (1) (3.) Such access and use must be actually enjoyed therewith. (4.) Such enjoyment must be without interruption for twenty years. (5.) If all these are proved, the right to the access and use of light so enjoyed becomes absolute and indefeasible, unless it can be explained by some deed or writing.

Pausing here for a moment, it will be observed that the statute does not in terms confer a right to light, but rather assumes its acquisition by use and enjoyment, and declares it to be "absolute and indefeasible."

Again, your Lordships will observe that nothing is said about enjoyment as of right; and notwithstanding s. 5 of the Act, which refers to enjoyment as of right, it was early decided that as regards light claimed under s. 3 enjoyment as of right need not be alleged or proved, and that the right, whatever it may be, is acquired by twenty years' use and enjoyment without interruption and without written consent: see *Truscott* v. *Merchant Taylors' Co.* (2) and *Frewen* v. *Phillips* (3); *Simper*

(1) (1885) 33 Ch. D. 238. (2) (1856) 11 Ex. 855.
(3) (1861) 11 C. B. (N.S.) 449.

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v. *Foley* (1) and *Harbidge* v. *Warwick*. (2) This was not so under the old law.

As regards use and enjoyment, there are some instructive decisions on unfinished and uninhabited houses, and on windows kept closed by shutters. These decisions shew that a right to light may be acquired in respect of a house which has stood for twenty years without being occupied or even finished so as to be fit for occupation; and that the fact that shutters have been closed for some months at a time does not prevent the acquisition of a right to light through the windows: see *Courtauld* v. *Legh* (3); *Cooper* v. *Straker* (4); *Collis* v. *Laugher* (5); *Smith* v. *Baxter*. (6)

These decisions did not, however, turn upon or settle with any precision the amount of light to which a right is acquired by twenty years' user. Nor is the statute clear upon this point. At one time it appears to have been considered that in all cases the size and situation of the aperture through which light had come for twenty years formed both the maximum and minimum measures of the right acquired, without reference to the use and enjoyment of the light which had so come. This view was based on some observations made by Lord Westbury in *Tapling* v. *Jones* (7), and on Lord Cranworth's judgment in *Yates* v. *Jack* (8), which I will notice presently. Lord Chelmsford took the same view in *Calcraft* v. *Thompson*. (9)

But this view was emphatically negatived by the Court of Appeal in Chancery in *Kelk* v. *Pearson* (10), *City of London Brewery Co.* v. *Tennant* (11), and *Leech* v. *Schweder*. (12) In *Moore* v. *Hall* (13), however, both Mellor and Manisty JJ. adopted the interpretation thus repudiated, but it does not appear that they were aware of the repudiation.

Kelk v. *Pearson* (10) shews that in ordinary cases a person

(1) (1862) 2 J. & H. 555.
(2) (1849) 3 Ex. 557.
(3) (1869) L. R. 4 Ex. 126.
(4) (1888) 40 Ch. D. 21.
(5) [1894] 3 Ch. 659.
(6) [1900] 2 Ch. 143.
(7) 11 H. L. C. 305–6.
(8) L. R. 1 Ch. 295.
(9) 15 W. R. 387.
(10) L. R. 6 Ch. 809.
(11) L. R. 9 Ch. 212.
(12) (1874) L. R. 9 Ch. 463.
(13) 3 Q. B. D. 178.

does not necessarily acquire a right to enjoy in future all the light he has had for twenty years. He may have had more than was reasonably required either for domestic or business purposes; and in that case his right to protection is limited to the amount of light reasonably required.

There can be no doubt that Lord Cranworth's language in *Yates* v. *Jack* (1), and the head-note to it, and the form of injunction granted, have been regarded as authorities for the view that in all cases the statute confers a right to all the light which has come to a window for twenty years; and there are passages in the judgments of Cotton and Bowen L.JJ. in *Scott* v. *Pape* (2) which support the same view. This is to be regretted, as it has tended to unsettle the rule laid down in *Kelk* v. *Pearson*. (3) The decision in *Yates* v. *Jack* (1) did not, however, really go so far as has been supposed, for the plaintiff's windows were darkened to such an extent as to render the plaintiff's house much less convenient for purposes of business than it was before. The case did not turn on the mere fact that some diminution of light was proved. The plaintiff's right to light was clearly infringed, whether the measure of the light to which he was entitled was all that had come through his windows, or only so much as was reasonably necessary for business purposes. If these facts are borne in mind, nothing will be found in the actual decision which conflicts with the views previously expressed by Lord Cranworth in *Clarke* v. *Clark* (4) and adopted by the Court of Appeal in the cases already mentioned.

The common form of injunction in these cases is that adopted in *Yates* v. *Jack* (1) and *Dent* v. *Auction Mart Co.* (5) It is to restrain the defendants from erecting any building so as to obstruct the free access of light to the ancient windows of the plaintiff as such access was enjoyed previously to the taking down of the house which formerly stood on the site of the defendant's new buildings.

This form is framed upon the supposition that the plaintiff

(1) L. R. 1 Ch. 295.
(2) 31 Ch. D. 554.
(3) L. R. 6 Ch. 809.
(4) L. R. 1 Ch. 16.
(5) L. R. 2 Eq. at p. 255.

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has established his right to the amount of light which he, in fact, enjoyed before the obstruction complained of. But it by no means follows from the form that every one is entitled to an injunction who can prove that he has been deprived of some of the light which he, in fact, had before it was interfered with. He may have had more than he can acquire a right to have preserved in future. I am, however, under the impression that this inference has been drawn, and that the form has been regarded as strengthening the view of the law repudiated in *Kelk* v. *Pearson*. (1)

So to regard the form is, in my opinion, a mistake. The doctrine laid down in *Back* v. *Stacey* (2), as I understand it, is the same as that laid down, although in somewhat different language, by the Court of Appeal in *Kelk* v. *Pearson* (1) and *City of London Brewery Co.* v. *Tennant* (3), and must, I think, be taken as finally established and as good sound law which your Lordships should adopt, notwithstanding the observations in the Irish case of *Mackey* v. *Scottish Widows' Co.* (4) That doctrine, as stated in *City of London Brewery Co.* v. *Tennant* (3), is that generally speaking an owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling-house, if it is a dwelling-house, or for the beneficial use and occupation of the house if it is a warehouse, a shop, or other place of business. (5) The expressions "the ordinary notions of mankind," "comfortable use and enjoyment," and "beneficial use and occupation" introduced elements of uncertainty; but similar uncertainty has always existed and exists still in all cases of nuisance, and in this country an obstruction of light has commonly been regarded as a nuisance, although the right to light has been regarded as a peculiar kind of easement.

If a more absolute standard had been adopted in all cases, certainty would, no doubt, have been gained; but the consequences would frequently have been very oppressive on the

(1) L. R. 6 Ch. 809.
(2) 2 C. & P. 465; 31 R. R. 679.
(3) L. R. 9 Ch. 212.
(4) Ir. Rep. 11 Eq. 541.
(5) See L. R. 9 Ch. 216, 217.

owner of the servient tenement, and far more so than under the old law. The owner of the servient tenement could have done nothing on his own land which, in fact, diminished the light acquired by his neighbour, even if all of it was not wanted for comfortable enjoyment or business purposes. It would follow that the owner of a piece of vacant land opposite to a house in an ordinary street could not build upon it at all after twenty years. The adherence to the old but uncertain standard of comfort and convenience avoids the danger of oppression and extortion, and renders it necessary to take a wider view of each case, especially when an injunction is asked for.

The decision in *Kelk* v. *Pearson* (1) has a far-reaching effect. If there is no absolute right to all the light which comes to a given window, no action will lie for an obstruction to that light unless the obstruction amounts to a nuisance. If there is no right of action, a fortiori there is no right to an injunction to prevent a permanent diminution of light unless it amounts to a nuisance. But, in considering what is an actionable nuisance, regard is had, not to special circumstances which cause something to be an annoyance to a particular person, but to the habits and requirements of ordinary people, and it is by no means to be taken for granted that a person who wants an extraordinary amount of light for a particular business can maintain an action for a diminution of light if only his special requirements are interfered with. Some important decisions will be found as to nuisances to persons carrying on delicate trades, or requiring more comfort or freedom from annoyance than ordinary people, in the cases of *Walter* v. *Selfe* (2), *Crump* v. *Lambert* (3), and *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.* (4); and as to the character of the neighbourhood, see *St. Helen's Smelting Co.* v. *Tipping*. (5)

The expression "right to light" is sanctioned by the Prescription Act, and is convenient; but its use is apt to lead to

(1) L. R. 6 Ch. 809.
(2) (1851) 4 De G. & Sm. 322.
(3) (1867) L. R. 3 Eq. 409.
(4) [1902] A. C. 393.
(5) (1865) 11 H. L. C. 642.

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error and to forgetfulness of the burden thrown on the servient tenement. This burden, however, ought never to be lost sight of in considering the extent of the right claimed in respect of the dominant tenement.

But the adoption of the more flexible standard of comfort and convenience has introduced difficulties of a serious nature, especially when dealing with places of business, and it is not surprising that different views on this subject should have been taken, and that the decisions upon it should be inconsistent with each other. That they are inconsistent is apparent from the careful review of them by Wright J. in *Warren* v. *Brown*. (1)

In applying the rule laid down in *Kelk* v. *Pearson* (2) it is impossible to avoid considering how much light is left and where it comes from. But the question to be decided is not how much light is left, but whether the plaintiff has been deprived of so much as to constitute an actionable nuisance. If he has, it is no defence to say that he has as much light left as most other people: see *Dent* v. *Auction Mart Co.* (3) Too much weight may have been given by Wright J. to the amount of light left in *Warren* v. *Brown* (1), and this may explain the reversal of his decision by the Court of Appeal. (4)

There is no rule of law that if a person has 45 degrees of unobstructed light through a particular window left to him he cannot maintain an action for a nuisance caused by diminishing the light which formerly came through that window: *Theed* v. *Debenham*. (5) But experience shews that it is, generally speaking, a fair working rule to consider that no substantial injury is done to him where an angle of 45 degrees is left to him, especially if there is good light from other directions as well. The late Lord Justice Cotton pointed this out in *Ecclesiastical Commissioners* v. *Kino* (6): see also *Parker* v. *First Avenue Hotel Co.* (7)

As regards light from other quarters, such light cannot be

(1) [1900] 2 Q. B. 722.
(2) L. R. 6 Ch. 809.
(3) L. R. 2 Eq. 250, 251.
(4) [1902] 1 K. B. 15.
(5) (1876) 2 Ch. D. 165.
(6) 14 Ch. D. 228.
(7) (1883) 24 Ch. D. 282.

disregarded; for, as pointed out by James V.-C. in the *Dyers' Co.* v. *King* (1), the light from other quarters, and the light the obstruction of which is complained of, may be so much in excess of what is protected by law as to render the interference complained of non-actionable. I apprehend, however, that light to which a right has not been acquired by grant or prescription, and of which the plaintiff may be deprived at any time, ought not to be taken into account. (See the case just cited.)

The purpose for which a person may desire to use a particular room or building in future does not either enlarge or diminish the easement which he has acquired. If he chooses in future to use a well-lighted room or building for a lumber-room for which little light is required, he does not lose his right to use the same room or building for some other purpose for which more light is required. *Aynsley* v. *Glover* (2) is in accordance with this view. But if a room or building has been so built as to be badly lighted, the owner or occupier cannot by enlarging the windows or altering the purpose for which he uses it increase the burden on the servient tenement. *Martin* v. *Goble* (3), where a malthouse was turned into a workhouse, may, I think, be upheld on this principle; and the observations of Wood V.-C. on *Martin* v. *Goble* (3) in *Dent* v. *Auction Mart Co.* (4) support this view.

Coming now to the present case, I am clearly of opinion that no injunction, and certainly no mandatory injunction, ought to have been granted. Joyce J. was asked for an injunction and he refused it, and, in my opinion, quite rightly. He came to the conclusion that although there would be a sensible diminution of light and some inconvenience to the plaintiffs, yet they had not established by twenty years' user a right to all the light which they had had, and that the obstruction complained of would not amount to an actionable nuisance, and so infringe the plaintiffs' right. The Court of Appeal, taking a different view of the amount of light to which the plaintiffs were entitled, reversed this decision, and ordered

(1) (1870) L. R. 9 Eq. 438.
(2) (1874) L. R. 18 Eq. 544; 10 Ch. 283.
(3) 1 Camp. 320.
(4) L. R. 2 Eq. 238.

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a partial demolition of the buildings erected by the defendants. For the reasons already given, I have come to the conclusion that this was wrong.

I should stop here were it not that I feel very strongly that in any view of the case it was not one for a mandatory injunction. I am convinced that even if the plaintiffs have a cause of action, the damages which could properly be awarded them would be very small, and to grant a mandatory injunction in such a case as this would be unduly oppressive and not in accordance with the principles on which equitable relief has been usually granted: see the *Curriers' Co.* v. *Corbett* (1), *Robson* v. *Whittingham* (2), and *National Provincial Plate Glass Co.* v. *Prudential Assurance Co.* (3), in all of which an injunction was refused, although the plaintiff's legal right had been infringed. In *Warren* v. *Brown* (4) the Court of Appeal only gave damages. The present case is eminently one in which damages would be an adequate remedy, even assuming the plaintiffs could prove a small nuisance for which some damages could be properly given; and where that is the case an injunction, and especially a mandatory injunction, ought not to issue. The general rule that where a legal right is continuously infringed an injunction to protect it ought to be granted is subject to qualification, as was carefully explained by Sir George Jessel in *Aynsley* v. *Glover* (5), and more recently by the Court of Appeal in *Shelfer* v. *City of London Electric Lighting Co.* (6)

My Lords, the result of the foregoing review of the authorities is not altogether satisfactory. The general principle deducible from them appears to be that the right to light is in truth no more than a right to be protected against a particular form of nuisance, and that an action for the obstruction of light which has in fact been used and enjoyed for twenty years without interruption or written consent cannot be sustained unless the obstruction amounts to an actionable nuisance; and this often depends upon considerations wider

(1) (1865) 2 Dr. & Sm. 355.
(2) L. R. 1 Ch. 442.
(3) (1877) 6 Ch. D. 757, at p. 761.
(4) [1902] 1 K. B. 15.
(5) L. R. 18 Eq. 551 et seq.
(6) [1895] 1 Ch. 310, 314, 316, 322.

than the facts applicable to the complainant himself. There are elements of uncertainty which render it impossible to lay down any definite rule applicable to all cases. First, there is the uncertainty as to what amount of obstruction constitutes an actionable nuisance; and, secondly, there is the uncertainty as to whether the proper remedy is an injunction or damages. But, notwithstanding these elements of uncertainty, the good sense of judges and juries may be relied upon for adequately protecting rights to light on the one hand and freedom from unnecessary burdens on the other. There must be consideration for both sides in all these controversies.

In this case the Court of Appeal have, in my opinion, gone too far, and the appeal ought to be allowed with costs here and below.

Order of the Court of Appeal reversed and judgment of Joyce J. restored with costs here and below.

Lords' Journals, May 2, 1904.

Solicitors: *Hyde, Tandy, Mahon & Sayer; Slaughter & May.*

[HOUSE OF LORDS.]

(APPEAL COMMITTEE.)

H. L. (Sc.) 1904 Feb. 19.

MONTGOMERIE & CO. . . . . APPELLANTS;

AND

WALLACE-JAMES . . . . . RESPONDENT.

Practice—House of Lords—Reversal—Point not argued.

The defendants in an action relating to a piece of ground, and which involved questions of encroachment, right to the land, title to sue, and possession, appealed to the House of Lords against all the interlocutors of the Courts below. At the hearing in the House one only of these questions was argued by the defendants, and the appeal was allowed:—

Held, by the Appeal Committee, that the defendants were not entitled to an order for the reversal generally of the interlocutors appealed from, but only for the reversal of the interlocutors so far as they related to the question raised in the House.

PETITION to vary a draft judgment. (1)

In an action in which the appellants Montgomerie & Co. were defendants and the respondent was pursuer, the latter asked (inter alia) for an interdict against the appellants for taking possession of or encroaching on a small piece of ground on the river Tyne, alleged to belong to the Royal Burgh of Haddington.

The Lord Ordinary (Lord Kincairney), by interlocutor dated June 7, 1901, found (1.) that the piece of ground referred to had from time immemorial been in the use and possession of the magistrates of Haddington, and fell to be dealt with as part of the common good of the burgh; (2.) that the ground had been appropriated from time immemorial for the use and enjoyment of the burgesses and inhabitants. This interlocutor the First Division of the Court of Session affirmed on March 8, 1902.

The appellants appealed against the whole of the Lord Ordinary's interlocutor as well as the affirming interlocutor of the First Division, and against other interlocutors dated

(1) (1901) 2 F. 107; (1902) 4 F. 771; [1904] A. C. 73.

November 23, 1898, July 18, 1899, and November 17, 1899; but at the hearing at the bar of the House they argued only the point that the ground in question had not been dedicated to immemorial use by the burgesses and inhabitants, and the House on December 18, 1903, allowed the appeal. (1)

After the judgment of this House had been given, but before the draft order was passed, the respondent lodged a petition to the effect that the appellants were not entitled to a reversal of the whole of the interlocutors appealed from as they had not argued all the points involved therein; that in fact they had only argued the one point as to the public use of the land in question. He therefore asked the House to limit the order of reversal to that one point, because a general reversal of all five interlocutors which dealt with other points than the point of public use would warrant the inference that the important points left unargued had been considered by the House.

The petition came before the Appeal Committee, consisting of the Earl of Halsbury L.C., and Lords Macnaghten, James of Hereford, Robertson, and Lindley, on February 19, 1904.

EARL OF HALSBURY L.C. The question of title to the land in question was raised; but when the learned counsel came to argue the case he said he would not trouble the House with anything about title. That being so, he allowed that part of the interlocutor to stand.

The Appeal Committee held that the appellants were only entitled to have the interlocutors reversed so far as they related to the point which their counsel had argued. And the following order was passed:—

> *Ordered and adjudged, that the said interlocutor of the Lords of Session in Scotland of the* 17*th day of November*, 1899, *in so far as it finds the appellants liable in the expenses of the reclaiming note, and also the said interlocutor of the Lord Ordinary there, of the* 7*th day of June*, 1901, *in so far as it finds*

(1) See ante, p. 73.

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that the piece of ground referred to in the action "has been appropriated from time immemorial for the use and enjoyment of the burgesses and inhabitants," and also the said interlocutor of the Lords of Session there, of the 8th day of March, 1902, so far as it adheres to the said finding of the said Lord Ordinary, and also in so far as it finds the respondent entitled to expenses, be, and the same are hereby, reversed: And it is further ordered and adjudged, that the note of suspension and interdict presented by the respondent (complainer below), be, and the same is hereby, refused: And it is further ordered, that the respondent do pay, or cause to be paid, to the said appellants the costs of the action in the Court of Session: And it is further ordered, that the respondent do pay, or cause to be paid, to the said appellants the costs incurred in respect of the said appeal to this House.

Lords' Journals, February 19, 1904.

Agent for appellants: *John Kennedy, W.S., for T. S. Paterson, W.S., Edinburgh.*

Agent for respondent: *A. & W. Beveridge, for Patrick & James, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

MARQUESS OF BREADALBANE . . APPELLANT;

AND

STEWART AND ANOTHER . . . . . RESPONDENTS.

H. L. (Sc.) 1904 March 3.

Scottish Law—Landlord and Tenant—Condition to take over Sheep at Expiration of Lease—Forfeiture of Lease.

A tenant in a letter offering to take a lease of a farm for ten years from 1897 stipulated that at his "awaygoing at the expiration of the lease" the landlord should take over the sheep at a valuation. The lease contained a clause that the lease should be forfeited for non-payment of rent, and, the tenant having failed to pay five half-years' rent, the landlord put an end to the lease in February, 1902, and refused to take over the sheep:—

Held, reversing the decision of the Second Division of the Court of Session, that "awaygoing" must be taken to mean the legal expiration of the lease, and that the landlord on the tenant's default was not bound to take over the sheep.

APPEAL from the Second Division of the Court of Session, Scotland. (1).

This case came before the Sheriff Substitute in respect to the appointment of an oversman between the appellant, the Marquess of Breadalbane, the landlord, and his tenant Peter Stewart and his trustee in bankruptcy Henry Mackenzie, the respondents. But the only point in the appeal was whether the landlord was bound to take over a stock of sheep.

On March 2, 1897, the tenant wrote to the landlord a letter which contained the following clauses; and these the landlord accepted: "I, Peter Stewart, residing at Rossal, Island of Mull, hereby make offer to your lordship of the yearly rent of 170*l.* sterling for the farm of Fernochs and Achnamaddy, and that on a lease of ten years from and after my entry thereto, which as regards the houses and grass lands shall be at the term of Whitsunday, 1897, and as regards the arable land at the separation of that year's crop from the ground, with a mutual

(1) (1903) 5 F. 359.

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break at the term of Whitsunday, 1902, and on the following conditions. . . . I hereby agree to take over from the present tenants by valuation the sheep stock of the farm in their several classes, duly proportioned but only to the number of two thousand sheep in all exclusive of lambs, and it is hereby declared that your lordship or next incoming tenant at my awaygoing shall be bound to take over not more than two thousand sheep of all ages. . . . And I bind and oblige myself, my heirs and executors whomsoever, to implement and fulfil the whole articles and conditions of lease of farms and possessions on the Breadalbane estates, a copy whereof is annexed and signed by me as relative hereto, in so far as not altered by this offer. In witness whereof. . . ."

The printed lease contained the following clause: "21. In the case of all farms upon which sheep are regularly kept the tenant shall be bound and obliged to take at entry the usual sheep stock of the farm at prices to be fixed by arbitration as after provided, and on delivery either pay cash or give satisfactory security for payment of the price at the term of Martinmas following, with interest thereon at five per cent. from the previous term of Whitsunday, and at the expiry of the lease the incoming tenant shall in like manner take the regular sheep stock of the farm. . . . The proprietor or next incoming tenant shall in no case be bound to take over from an outgoing tenant any cross-bred sheep. . . . 25. In the event of the rent stipulated not being fully paid to the proprietor or his factor within three months after the same becomes due in any year . . . . it shall be in the option of the proprietor . . . . to put an end to the lease without prejudice to his claim for past due or current rent, or for implement of any of the obligations of the lease up to the date of such forfeiture, or for damages in respect of failure to implement any of the obligations, and that by the simple form of a written intimation that he has exercised this option under his own hand or the hand of his factor or agent addressed to the tenant and despatched by post, declaring that the despatch by post of the said intimation shall have the effect ipso facto of bringing the lease to an end as at that date. . . . 27. All questions that may arise between the proprietor

and tenant or between the outgoing and incoming tenants shall be submitted to the decision of two arbiters."

The tenant entered on the farm at Whitsunday, 1897. At Whitsunday, 1901, the tenant gave notice he would exercise his right to terminate the lease at Whitsunday, 1902. He was then in arrear with his rent to the extent of three half-yearly payments. He failed to pay the rent due at the time of giving notice, and again failed to pay the half-yearly rent due in November following; and accordingly on February 8, 1902 (the tenant being then in arrear with his rent to the extent of five half-yearly payments), the landlord in pursuance of his right to forfeit the lease sent notice to the tenant to bring the lease to an end. Following on this the landlord brought an action for payment of rent due, and another for removing the tenant in the Sheriff Court, and obtained decree in both. In the latter case the Sheriff Substitute granted decree upon the condition that the sheep stock should be taken over at a valuation, but the Sheriff upon appeal granted decree without this condition.

On the tenant appealing to the Second Division of the Court of Session, their Lordships (Lord Moncreiff dissenting) on January 14, 1903 (1), sustained the appeal, and affirmed the Sheriff Substitute's decision to the effect that the tenant was entitled to payment for the sheep and to an oversman being appointed for the purpose of valuation.

March 3. *Scott Dickson, L.A.* (with him *Scott Brown*), (both of the Scottish Bar), for the appellant. The obligation to take over the sheep at a valuation did not exist after the forfeiture of the lease. The obligation applied only to an expiration of the lease within the contemplation of the parties when it was entered into, namely, after its full course of ten years or the break mutually agreed on. "Awaygoing" means on legal expiration of lease or on its break; it does not mean the away-going when the tenant has put himself in the wrong by not paying rent, and the landlord has to give an irritancy notice. It was a mutual contract, and must be performed by both

(1) 5 F. 359.

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parties; when one party to a contract fails to fulfil his obligations under it he is not entitled to require that the other party shall fulfil his obligations, and the latter can revoke the contract so far as it is not completed: *Davie* v. *Stark* (1); *Bidoulac* v. *Sinclair's Trustee* (2); *Smith* v. *Harrison & Co.'s Trustee.* (3) The Court below proceeded on *Pendreigh's Trustee* v. *Dewar* (4), but that case is in appellant's favour. [He also cited *Scott's Executors* v. *Hepburn* (5) and *Morton* v. *Montgomerie.* (6)]

Haldane, K.C. (with him *Macmillan*), (the latter of the Scottish Bar), for the respondents. "Awaygoing" means "my (the tenant) going away," and covers any stoppage of the tenancy. The obligation is not under a contract of lease at all. It is an obligation to purchase, and a compensation clause distinct from the lease: Bell's Principles, s. 577.

Scott Dickson, L.A., in reply.

EARL OF HALSBURY L.C. My Lords, this case raises undoubtedly a very short point, and I think it may be dealt with very shortly. I am of opinion that the judgment ought to be reversed.

It seems to me that the contemplation of the tenant when he described his "awaygoing" was contemplating that awaygoing in pursuance of the arrangements in respect of the period during which he was to occupy as tenant, and certainly was not contemplating in the use of those words a breach of his bargain with his landlord which would occur in the event of his non-payment of rent and his landlord consequently putting an end to the tenancy. I think what he meant was what he says: "I am going at the end of ten years, subject to a right to put an end to my tenancy at certain breaks, and when I go away" such and such things. That is how I construe the words, and I believe that that is what the parties meant.

My Lords, with regard to the authority cited by the learned judges of the Second Division of the Court of Session, the case of *Pendreigh's Trustee* v. *Dewar* (4), so far as it is relevant at all, tells the other way. The learned judges in that case—and

(1) (1876) 3 R. 1114.
(2) (1889) 17 R. 144, 148.
(3) (1893) 21 R. 330.
(4) (1871) 9 M. 1037.
(5) (1876) 3 R. 816.
(6) (1822) 1 S. 344, 2nd ed. 322.

I think they were right—construed the instrument as containing two totally separate and independent stipulations: the one was that there was to be the relation of debtor and creditor between the parties, and the other was the relation of tenancy. They construed the former stipulation as one which was in any event to be implemented; that is to say, one was to be the borrower of the money and the other to be the lender of the money, and whatever was the termination of the other relation between them—although in that particular case the term was fixed—the borrower was to pay what he had borrowed to the person who had lent it. Under the circumstances, it certainly would have been an extremely monstrous decision if it was to be held, the relation between the parties being that which the judges hold to be the relation between them, that the obligation of the borrower to pay the money should be put an end to by the termination of the tenancy. What bearing that has on this case I fail to see; but the real tendency of that decision appears to me to be in the other direction from that for which it is quoted.

My Lords, this case seems to me to depend entirely upon the use of one word in the stipulation; and, looking at the context and at the person who uses the phrase, namely, the person who proposes to become a tenant, I do not think he contemplated the tenancy being put an end to by his own fault, and I think "awaygoing" in his mouth meant the awaygoing at the end of the period during which he was to occupy the landlord's land. For these reasons I move your Lordships that the judgment of the Court below be reversed.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I construe the words exactly in the same way in which my noble and learned friend on the Woolsack construes them, and I have nothing to add.

LORD DAVEY. My Lords, I also agree. The question turns entirely upon the meaning of the words used in this clause, "at my awaygoing." I suppose if it were made clear that the right construction of those words was that they meant whether that tenancy expired by effluxion of time or whether it expired by

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the exercise by the landlord of his rights to re-enter, the Courts would give effect to it notwithstanding that the tenant was in default. But I am not prepared to differ from the construction which I understand all your Lordships put upon those words. Looking at the place in which you find them, where the only termination of the lease spoken of expressly in the missive letter itself is on the expiration of ten years or the determination of it by the break in 1902, I think it is probably the soundest construction to treat "my awaygoing" as referring only to the expiration of the tenancy by effluxion of time; and that being so, there is no contract to purchase the sheep in the events which have happened.

LORD ROBERTSON. My Lords, I entirely agree in what has been said by my noble and learned friend on the Woolsack, and also in the judgment of Lord Moncreiff. The clause for taking over the stock is expressed as part of a scheme for occupation of the farm on payment of rent during a period of years. The forfeiture clause, on the other hand, brings that scheme to an end owing to the inability of the tenant to carry it out, as is shewn very plainly by the words which are put in to save alive the claim for rent up to the date of forfeiture. I entirely agree in what has been said by my noble and learned friend on the Woolsack as to the case of *Pendreigh's Trustee* v. *Dewar* (1), which, so far as it bears upon the matter at all, rather supports the conclusion of Lord Moncreiff than that of the Second Division.

LORD LINDLEY. My Lords, I am of the same opinion.

Ordered that judgment appealed from be reversed, and that the respondents do pay to the appellant the costs both here and below.

Lords' Journals, March 3, 1904.

Agents for appellant: *Faithfull & Owen, for Davidson & Syme, W.S., Edinburgh.*

Agents for respondents: *Flux, Thompson & Quarrell, for Gill & Pringle, S.S.C., Edinburgh.*

(1) 9 M. 1037.

[HOUSE OF LORDS.]

REID . . . . . APPELLANT;

AND

MACBETH & GRAY . . . . . RESPONDENTS.

H. L. (Sc.)
1904
March 4.

Sale of Goods—Appropriation of Goods to Contract—Bankruptcy of Manufacturer—Right of Trustee to Articles in course of Manufacture—Ship—Mercantile Law Amendment (Scotland) Act, 1856 (19 & 20 *Vict. c.* 60), *s.* 1—*Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *ss.* 16, 17, 18.

A firm of shipbuilders contracted to build a ship for a firm of shipowners, to be classed 100 A1 at Lloyd's and to be constructed under the superintendence of the shipowners. The contract contained this clause: "(4.) The vessel as she is constructed, and all her engines, boilers, and machinery, and all materials from time to time intended for her or them, whether in the building-yard, workshop, river, or elsewhere, shall immediately as the same proceeds become the property of the purchasers, and shall not be within the ownership, control, or disposition of the builders, but the builders shall at all times have a lien thereon for their unpaid purchase-money." Before the ship was completed the shipbuilders became bankrupt. At the date of the bankruptcy there were lying at railway stations a quantity of iron and steel plates at the orders of the shipbuilders. These plates were claimed by the trustee in the shipbuilders' sequestration, and also by the shipowners. The plates had been passed by Lloyd's surveyor at the makers' works, and they were each numbered by the makers with the number of the vessel and with marks shewing the position which each plate was to occupy in the vessel:—

Held, reversing the decision of the First Division of the Court of Session, that the contract was for the purchase of a "complete ship," and the materials in question could not be regarded as appropriated to the contract or sold under the Sale of Goods Act. (1)

Seath & Co. v. *Moore*, (1886) 11 App. Cas. 350, followed.

APPEAL from the First Division of the Court of Session, Scotland. (2)

(1) By the Sale of Goods Act, 1893, s. 17, "Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred." By s. 18, "Unless a different intention appears, the following are rules for ascertaining the intentions of the parties as to the time at which the property in the goods is to pass to the buyer . . . . Rule 5 (1.): Where there is a contract for the sale of unascertained or future goods by descrip-

(2) See the previous decision which was followed in the case under appeal, (1901) 4 F. 345.

H. L. (Sc.) 1904 REID v. MACBETH & GRAY.

The question in this action was which of two claimants, the appellant Robert Reid (trustee of the sequestrated estates of Carmichael, Maclean & Co.), or the respondents Macbeth & Gray, were entitled to a sum of 1637*l.* deposited in bank. That sum represented a quantity of iron and steel plates and angles which on September 14, 1899, were lying at different railway stations in Greenock at the orders of Carmichael, Maclean & Co., shipbuilders, Greenock. On September 14, 1899, that firm failed, and on the following December 12 their estates were sequestrated, and the appellant was appointed trustee and claimed the above-mentioned property or its proceeds for division among the creditors. The respondents, on the other hand, who were purchasers of a ship in course of construction by Carmichael, Maclean & Co., maintained that the material lying at the railway stations was their property by virtue of a shipbuilding contract between them and the shipbuilders, or otherwise under the law of sale. The contract in question was as follows:—

"An agreement entered into this 27th day of October, 1898, between Carmichael, Maclean & Co. of Greenock (hereinafter called the builders) of the one part, and Macbeth & Gray of Glasgow (hereinafter called the purchasers) of the other part, witnesseth, that in consideration of the mutual agreements the parties agree as follows:

"(1.) That the builders will build for the purchasers, of the best materials and workmanship, a vessel and engines of the following dimensions, power, and class, namely: Class, Lloyd's 100 A1; dimensions—length, B.P., 375 feet; breadth, 49$\frac{9}{10}$ feet; depth, 29$\frac{9}{10}$ feet; and having cylinders of inches, and stroke, and a working pressure of lbs. to the square inch, and in all other respects according to the specifications and plans signed by the parties.

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tion, and goods of that description and in a deliverable state are unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made."

"(2.) The vessel shall be built under the superintendence of the purchasers and of any person for the time being appointed by them, and shall be ready for delivery afloat in a usual and convenient place at the tail of the Bank Dock by the 19th day of August, 1899.

"(3.) The purchasers shall pay for the vessel the sum of 34,200*l.*, say, 34,200*l.* sterling, payment to be made as follows: Half in cash on delivery, and balance by purchasers' six months' acceptances payable in London, renewable for two years, purchasers paying discounting charges and bill stamps. Purchasers to give builders a mortgage for account current over the whole steamer; also approved policies of insurance. Purchasers to have power to pay off their acceptances when desired by them. Builders have option of drawing on purchasers during construction as follows: For one-eighth when framed; for one-eighth when plated; and for one-fourth when launched; these acceptances to fall due on delivery of steamer, and to be retired by the builders, who shall pay the cost of discounting and retiring the same, bill stamps, etc.

"(4.) The vessel, as she is constructed, and all her engines, boilers, and machinery, and all materials from time to time intended for her or them, whether in the building-yard, workshop, river, or elsewhere, shall immediately as the same proceeds become the property of the purchasers, and shall not be within the ownership, control, or disposition of the builders, but the builders shall at all times have a lien thereon for their unpaid purchase-money.

"(5.) In the event of the builders making default in the prosecution of the construction of the vessel, engines, boilers, and machinery, or making default in her delivery by the date stipulated, it shall be competent for (but not incumbent upon) the purchasers to take possession of the vessel in her then state, and of all her engines, boilers, machinery, and all materials intended for her or them, as before mentioned, and to complete the vessel, engines, boilers, and machinery, and for this purpose with power to enter into any contract with other builders, and to use the yard, workshop, machinery, and tools of the builders, and the cost incurred by the exercise of

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any of the powers of this clause shall be deducted from the purchase-money then unpaid, if sufficient, and if not sufficient shall be made good by the builders. Any exercise of the powers of this clause shall be without prejudice to any claim for delay under clause 2."

"(9.) The cost of trial trip or trips shall be at the expense of the builders, they finding the crew necessary for the safe navigation of the vessel and for the engine department on such trial trips, coals, and engine stores, and also marine insurance on such trials. No delivery to be considered complete until after a trial satisfactory to the buyers' surveyor.

"Any dispute arising between the parties during the construction of the vessel, engines, boilers, and machinery shall be referred to the arbitration. . . ."

On clauses 4 and 5 the question mainly depended. It appeared that the plates and angles were forwarded to the railway stations by the manufacturers, Young & Alexander, iron merchants, Glasgow. This firm had contracted with the shipbuilders for the supply of such material as the shipbuilders might require, and it was the practice of the manufacturers to mark the materials with the number of the ship for which the plates and angles were ordered. The ship sold to the respondents was known as No. 29, and the plates and angles at the railway stations were marked with the number 29, and certain other marks indicated the particular position in the ship the plates and angles were meant to occupy. The number and marks were painted on the materials at the request of the shipbuilders, but something had to be done to them by the shipbuilders before they formed part of the ship. It was admitted by the appellant that a Lloyd's inspector passed the materials before they left Young & Alexander's yard or their sub-agent's yard; but there was no evidence that they were inspected by the respondents or on their behalf with the purpose of passing them as work under the contract. Further, the materials could not be properly inspected till wrought and attached to the vessel, or ready to be attached. On the other hand, a letter of the shipbuilders of July 4, 1899, treated the materials in question as the respondents' property.

On July 19, 1902, the First Division, following a previous decision of the Second Division in a case between the same parties (1), pronounced a formal judgment holding the respondents Macbeth & Gray entitled to the materials and other product.

March 3, 4. *Ure, K.C.* (of the Scottish Bar), (with him *Loehnis*), for the appellant. The judgment pronounced in the Court of Session was erroneous. The contract was for the purchase of a "complete ship," and not for material of which it was to be composed. The words of clause 4 "as the same proceeds" are indicative of the time at which the separate items of material are to become part of the subject of sale—namely, at the moment of incorporation. To say that the materials in question were intended for the ship does not help the respondents; such an intention cannot be manifested by one of the contracting parties, and so long as the other party had not accepted the separate parts as conforming to the contract, they were neither actually nor constructively incorporated. There is no difference between goods lying in railway stations (those here in question) and those lying in shipbuilders' yard (those in question in the previous case). (1) *Seath & Co.* v. *Moore* (2) governed this case. The main facts there were identical although they were more complicated. *Woods* v. *Russell* (3) and *Goss* v. *Quinton* (4) were overruled in *Wood* v. *Bell* (5): see also *Tripp* v. *Armitage* (6), *Laidler* v. *Burlinson* (7), and *Clarke* v. *Spence*. (8) These authorities are conclusive on the point. Since *Seath & Co.* v. *Moore* (9) the Sale of Goods Act, 1893, has been passed; but the changes were simply nominal, making the law in Scotland as in England. Sects. 16, 17, and 18 refer to the passing of property; none of

(1) *Reid* v. *Macbeth & Gray*, 4 F. 345.

(2) 11 App. Cas. 350, 355, 379.

(3) (1822) 5 B. & Ald. 942, 948; 24 R. R. 621.

(4) (1842) 3 Man. & G. 825; 60 R. R. 616.

(5) (1856) 5 E. & B. 772; 6 E. & B. 355.

(6) (1839) 4 M. & W. 687; 51 R. R. 762.

(7) (1837) 2 M. & W. 602; 46 R. R. 717.

(8) (1836) 4 Ad. & E. 448; 43 R. R. 395.

(9) 11 App. Cas. 350.

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these sections apply to the ship or materials here, which are included in an agreement for sale when the condition is fulfilled—namely, when the ship is completed. [He also cited ss. 5 and 62 of the Sale of Goods Act.]

Scott Dickson, L.A. (of the Scottish Bar), and *Muir Mackenzie*, for the respondents. In *Seath & Co.* v. *Moore* (1) there were five different contracts and sub-contracts, and all the separate agreements there contained nothing equal to the clauses 4 and 5 here. Under this contract, when the shipbuilder specified to the iron manufacturer the iron they got or when it was passed by Lloyd's surveyor, that was an appropriation under the contract; "Lloyd's class 100 A1" included not only the materials, size, and dimensions, but quality of metal; and all the plates were submitted and approved by Lloyd's surveyor, and when Lloyd's passed them they passed to the buyer in the sense of the statute. The certificate of Lloyd's not only applied to the completed vessel, but applied also to every part of the material.

The respondents said, "Give us a ship worth Lloyd's 100 A1," and it follows that every plate passed through Lloyd's inspectors has passed to them. These plates were inspected and passed at the iron manufacturers, and became the property of the purchaser of the ship.

In *Woods* v. *Russell* (2) the sole question was whether payment by instalments was payment. In *Goss* v. *Quinton* (3) the question was whether the property in the rudder had passed, and it was held there had been appropriation. In *Wood* v. *Bell* (4) there was nothing about material. There is no doubt that payment by instalments is evidence of appropriation: see Benjamin on Sales, 1888, pp. 299 et seq.

Appropriation may be done by the seller alone, and here there has been such an appropriation of the goods as brings them within the Sale of Goods Act. Goods may be sufficiently identified as buyer's if brought on to a particular site or if something has been done to them which brings them within

(1) 11 App. Cas. 350.
(2) 5 B. & Ald. 942; 24 R. R. 621.
(3) 3 Man. & G. 825; 60 R. R. 616.
(4) 5 E. & B. 772; 6 E. & B. 355.

the contract: *Ex parte Barter*. (1) The property passes to the buyer the moment the materials are sent from the works: *Reeves* v. *Barlow* (2); and see Lord Herschell L.C. in *McEntire* v. *Crossley Brothers*. (3)

Ure, K.C., in reply.

EARL OF HALSBURY L.C. My Lords, in this case I think I might say the question is covered by authority for a reason which I will give in a moment; but, looking at it as if it were res integra, I think the difficulty in the way of the Lord Advocate is that in my view in this contract there is no sale at all except the sale of a complete ship. I think the observations made by the learned counsel for the appellant in his last address to your Lordships are very cogent, that those sections upon which reliance has been placed, namely, ss. 4 and 5, lack every element of sale of the materials in question. It is an abuse of language to speak of these sections as a sale of the things to which they refer. My own view of those sections is that they were intended by the parties to form a security—I daresay it was an ineffectual attempt by the parties to form a security; but that which is sold is a complete ship.

My Lords, it seems to me a rather extraordinary, and I think I may say an incomprehensible, view that the inspection by Lloyd's of the materials is an acceptance, by the buyer of the ship, of those particular things which are to form portions of the ship when sold. There is no such provision in the contract; there is nothing in the relation of the parties which to my mind suggests the agency of Lloyd's as taking the place of the person who is to act on behalf of the purchaser. It is said that simply because Lloyd's, in the management of their business, think it right to say that they will not give a certificate that this ship is 100 A1 at Lloyd's without themselves having an opportunity of inspecting and passing materials of which the ship is to consist, the person who contracts that he will supply a ship 100 A1 at Lloyd's thereby places Lloyd's in the position of a person who is entitled to act on their behalf as

(1) (1884) 26 Ch. D. 510, 511. (2) (1884) 12 Q. B. D. 436.
(3) [1895] A. C. 457.

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the inspector and ascertainer, if I may so describe him, of those goods which are to form the ship in the ultimate result. My Lords, it appears to me that that is a most monstrous proposition, and if there were nothing more I should say it was a proposition for which there was no real authority to be found. But, further than that, in the very contract in which the ship, being 100 A1 at Lloyd's, is the thing sold by the one party and accepted by the other—in that very contract other persons representing the purchaser are to have rights inconsistent with the idea that Lloyd's certificate of these different plates would be a conclusive acceptance, on the part of the purchaser of the ship, of the goodness of the quality of the material.

My Lords, I think that of itself would be sufficient to dispose of this case; but as I said just now I think the matter is really concluded by authority, because your Lordships' House has had before it, in the case of *Seath* v. *Moore* (1), a contract which it would be in vain to attempt to distinguish from the present one. The only distinction, as I understand, which is insisted upon is this—that that which was there in five contracts is here in one. It is said that a different view would have been taken by their Lordships who decided that case if, instead of being in five different contracts, it had been on the same piece of paper. I cannot find the least foundation for that in any part of the judgments delivered by their Lordships in that case. And what seems to me to be absolutely conclusive in this case, and, as I have said, to cover the case now before your Lordships by authority, is what Lord Watson says in that case of *Seath & Co.* v. *Moore* (2), namely: "There is another principle which appears to me to be deducible from these authorities and to be in itself sound, and that is that materials provided by the builder and portions of the fabric, whether wholly or partially finished, although intended to be used in the execution of the contract, cannot be regarded as appropriated to the contract or as 'sold' unless they have been affixed to or in a reasonable sense made part of the corpus." It seems to me, considering that the noble and learned Lord was there dealing with a contract substantially the same as

(1) 11 App. Cas. 350. (2) 11 App. Cas. 350–81.

that upon which we are engaged, it would be an extraordinary thing if your Lordships were to depart from the principle there laid down.

Accordingly, my Lords, as I am of opinion that there was no sale here at all of these materials as distinguished from a contract of sale of the ship, and that there was no acceptance of these materials in any sense which can be relied upon, except in a sense which, as I have said, is inapplicable for the purpose, namely, the certificate of Lloyd's as to the goodness of the materials, it seems to me, with all respect to the learned judges who have decided the case in the Court below, that their decision was wrong and ought to be reversed; and I move your Lordships accordingly.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I think the case is governed by the decision in *Seath & Co.* v. *Moore* (1), and so far as it may not be governed by that case I entirely agree with the reasons which have been given by my noble and learned friend on the Woolsack.

LORD DAVEY. My Lords, I put the same construction upon the contract before your Lordships as my noble and learned friend on the Woolsack has put upon it.

I will only add a few words to what he has said as to the expression in the fourth clause of the contract about which we heard so much in the course of the argument, "as the same proceeds." I think "the same" must mean either as the ship proceeds or as the construction of the ship proceeds; but whether you put the one or the other of those meanings upon the words, it is clear, whatever else may be obscure in this fourth clause, that the goods in question are only to become the property of the purchaser from time to time as progress is made in the construction of the ship. From that I should certainly understand, as I think was the view of the Lord Ordinary, that according to the true construction of the clause it was only when the chattels in question were applied for the use of the ship, and became part of the structure of the ship,

(1) 11 App. Cas. 350.

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that it was intended that those words vesting the property should operate.

But supposing the construction contended for by the Lord Advocate and his learned junior were correct, I still think it would be impossible to uphold this judgment. I entirely agree with what my noble and learned friend has said as to the decision in *Seath & Co.* v. *Moore* (1); and the only suggestion by which it was attempted in any way to get rid of the authority of that case was that at that time the Sale of Goods Act, 1893, had not been passed. I am unable to see that that is any solid ground for distinguishing the cases. At that time, as was pointed out in the judgments, although a contract of sale, until delivery, created only a jus in rem against the goods according to the law of Scotland, still, having regard to the provisions of the Mercantile Law Amendment Act, which was then in force, the distinction was really only a question of words and not of substance. I turn to the Sale of Goods Act, and I find that the material sections are those referred to by the learned judges of the Second Division, namely, ss. 16, 17, and 18. [His Lordship read s. 16 and rule 5 of s. 18.] My Lords, it seems to me that those sections have no application whatever to the case before your Lordships, for the simple reason, which was mentioned by my noble and learned friend on the Woolsack, that here there was no contract for purchase of these materials. The learned counsel and also the learned judges in the Court below seem to me to have proceeded on the supposition or hypothesis that this contract contained, not only a contract for the purchase of the ship, but a separate contract for the purchase of the materials also; and that seems to me to be a complete fallacy. There is only one contract—a contract for the purchase of the ship. There is no contract for the sale or purchase of these materials separatim; and unless you can find a contract for the sale of these chattels within the meaning of the Sale of Goods Act, it appears to me that the sections of that Act have no application whatever to the case.

I think, therefore, that the case is exactly covered by the decision given by your Lordships' House in the case of *Seath*

(1) 11 App. Cas. 350.

& Co. v. *Moore* (1), and I will only express my entire concurrence in the judgments in that case of those very learned Lords, Lord Blackburn and Lord Watson.

LORD ROBERTSON. My Lords, I have only to add, in a single word, that I cannot find, any more than your Lordships do, in this contract any contract to buy materials, or to buy anything except a completed ship.

Art. 4 of the contract seems to me exactly to fall within sub-s. 4 of s. 61 of the Act—that is to say, it "is intended to operate by way of mortgage, pledge, charge or other security." The circumstance that it is inserted in what is a sale of a completed ship will not avail to make it a sale in the sense of the Sale of Goods Act. In fact, the 4th article does not even purport to express a sale: it merely asserts to be the property of the purchaser of the ship what has no more relation to it than that it is intended by the builder for the ship. This as it stands is impossibly wide, and I agree with your Lordships that the respondents' attempt to make those materials "specific" in the sense of the Sale of Goods Act, by saying that they had been passed by Lloyd's surveyors, is not warranted by the terms of the contract. The reference to Lloyd's in the 1st article cannot be strained to this effect. The truth is that the 4th article is simply a bold attempt to sweep into the net the whole of the materials required for the ship. The judgments of this House in *Seath & Co.* v. *Moore* (1) negative the possibility of that being legally done.

LORD LINDLEY. I am of the same opinion, and I cannot usefully add anything.

Ordered that the interlocutor appealed from be reversed, and that the respondents do pay to the appellant the costs both here and below.

Ure, K.C. May I ask your Lordships' attention to the order pronounced in the other appeal, *Reid* v. *Macbeth & Gray* (2) (second appeal), by which you extended the time until judgment

(1) 11 App. Cas. 350.

(2) 4 F. 345.

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was given in this appeal. It was asked, and I think it was consented to by the other side, that the time should be extended for one month.

Muir Mackenzie. Yes.

EARL OF HALSBURY L.C. By all means.

Lords' Journals, March 4, 1904.

SECOND APPEAL.

This was a joint petition of the appellant and respondents praying that the interlocutor of the Second Division of the Court of Session, Scotland, dated December 6, 1901 (1), in accordance with the above decision of this House (which ruled this case), should be discharged, and the interlocutor of the Lord Ordinary (Lord Low) be restored, with costs, both here and below, against the respondents, and repayment of the costs already paid.

H. McKenna appeared for both the petitioners.

THE HOUSE (Earl of Halsbury L.C., and Lords Davey, James of Hereford, and Robertson) gave judgment for the appellant in accordance with the prayer of the petition.

Lords' Journals, April 26, 1904.

Agents for appellant: *McKenna & Co., for Donaldson & Alexander, Writers, Glasgow, and Drummond & Reid, Edinburgh.*

Agents for respondents: *Thomas Cooper & Co., for J. & J. Ross, W.S., Edinburgh.*

(1) 4 F. 345.

[HOUSE OF LORDS.]

COUNTY COUNCIL OF THE COUNTY OF LANARK. . . . . } APPELLANTS;

AND

HART. . . . . RESPONDENT.

H. L. (Sc.) 1904 *March* 10.

Scottish Law—Remuneration of Procurator Fiscal—Preliminary Inquiries into Non-prosecuted Cases—County General Assessment Act, 1868 (31 & 32 *Vict.* c. 82), s. 3, *sub-ss.* 2, 3—*Rogue Money Act*, 1724 (11 *Geo.* 1, c. 26), s. 12.

In an action for debt, the debt must be established either by contract or at common law or by statute.

Sect. 4 of the County General Assessment Act, 1868, authorized an assessment to be imposed called the "county general assessment"; and s. 3 provided that "the following salaries, fees, outlays, and expenses, namely (sub-s. 2): The salaries or fees and necessary outlays of Procurators Fiscal in the Sheriff and Justice of Peace Courts . . . . in so far as such salaries, fees, and outlays are at present in use to be paid by each county." Sub-s. 3: "The expenses incurred in searching for, apprehending, subsisting, prosecuting, or punishing criminals:—in so far as any such salaries, fees, outlays, and expenses are not by law or usage payable or provided from other funds than those raised by the Commissioners of Supply, may be defrayed by the said Commissioners out of the 'county general assessment.'" Under the Rogue Money Act of 1724 certain fees had been paid to the Procurators Fiscal for criminal prosecutions. Subsequently those charges which lay on the county were undertaken by the Treasury, and eventually a salary in lieu of fees was paid to the Procurators Fiscal. The Procurator Fiscal of the lower ward of Lanark alleged that his salary only included cases which were reported or went to trial, and made a claim for remuneration for those cases in which he made inquiry, but which went no further. Since 1851 the county council had refused to pay this claim. And from 1851 to 1868, when the County General Assessment Act came into force, no attempt had been made by the then Procurator Fiscal to compel the county to pay, although accounts by the Procurator Fiscal were furnished at different periods:—

Held, reversing the decision of the Second Division of the Court of Session, that it could not be said that in the county of Lanark "it was in use" to pay these fees at the date of the Act of 1868, and therefore the county was not liable.

APPEAL from an interlocutor of the Second Division of the Court of Session, Scotland. (1)

(1) (1902) 40 S. L. R. 117.

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This action was brought by the respondent James Neil Hart, Procurator Fiscal of the lower ward of Lanarkshire, against the appellants, the county council of Lanark, concluding for declaration that the appellants were bound to pay to the respondent, as holder of the office of Procurator Fiscal of the lower ward of Lanarkshire at Glasgow, reasonable remuneration in respect of all criminal business performed by him as holder of the office other than such as was covered by the salary paid him by the Exchequer; that is to say, other than business performed and discharged by him in connection with (1.) criminal and other cases in which precognitions of witnesses or reports are submitted to him for the instructions of Crown counsel, and (2.) criminal prosecutions in the Sheriff Court instituted under warrant from the Sheriff which result in trial, or in which the accused party is served with a libel or warrant of commitment for trial. The first question was whether there was any residue of criminal business performed by the respondent not covered by his Exchequer salary for which the county were liable to remunerate him. The second question was whether in any case the county were liable to remunerate the respondent for criminal business within the city of Glasgow, as for the purpose of criminal administration the lower ward included the city of Glasgow. The respondent alleged that (condescendence 3) from an early period to 1776 the whole expense of criminal investigations and prosecutions, including the remuneration to Procurators Fiscal, were paid in each county in Scotland out of the "rogue money" raised under the Act of 1724 (11 Geo. 1, c. 26), by which it was enacted (s. 12) that the freeholders of every shire, county, or district in North Britain should assess their several shires or stewartries for the purpose of, and that such moneys so raised should be applied in, defraying the charges of apprehending of criminals and of subsisting of them in prison until prosecution, and of prosecuting such criminals for their several offences by due course of law, and to and for no other use or purpose whatsoever; that (condescendence 4) in 1776 the Imperial Exchequer undertook payment of the expenses and outlays incurred in what were technically known as "reported cases," namely,

cases in which precognitions of witnesses had been reported or reports had been made by the Procurator Fiscal for the instructions of Crown counsel in so far as regarded the expenses incurred subsequently to a Sheriff's warrant; that the relative order by the Barons of Exchequer (February 6, 1776) declared that the Sheriffs and stewards-depute shall not be allowed any expenses for taking precognitions of crimes tried in their own Courts or before justices of the peace, or which are not transmitted to His Majesty's advocate, nor any expense claimed on account of prosecutions had in their own Courts, saving to them to recover all such articles of expense out of the rogue money or county funds of their respective counties or stewartries; that therefore the expenses of unreported cases, namely, cases tried summarily on complaints by Procurators Fiscal acting on their own responsibility or by direction of the Sheriff without being reported to Crown counsel, and of all other investigations and inquiries falling to be made by the Procurators Fiscal, continued to be paid by the counties out of the rogue money; that in 1832 by the Act 2 & 3 Will. 4, c. 65, ss. 44, 45, the powers, duties, and functions of the freeholders, and especially the assessment, collection, and management of the rogue money, were transferred to the Commissioners of Supply in each county; that (condescendence 5) in the year 1851 the Exchequer gave a further relief to the counties by undertaking payment of the expenses connected with criminal prosecution in the Sheriff's Courts instituted under warrants from the Sheriffs; that in 1855 the relief was extended to expenses incurred previous to the date of a Sheriff's warrant, but that (see Treasury Minute of January 29) did not extend to or include cases of sudden death not reported to Crown counsel, the expenses connected with which were not payable by the Exchequer; that the relief thus given (Exchequer Circular, 1860) was limited "to cases which result in trial, or in which the accused parties should have been served with a libel or a warrant of commitment for trial"; that in 1850 arrangements had been made by the Treasury whereby Procurators Fiscal should receive from Exchequer salaries in lieu of fees previously paid to them by the Exchequer, and that

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these arrangements were afterwards extended to the cases of which the counties were relieved in 1851, the salaries fixed in Exchequer being based on the annual average amount of fees paid to the respective Procurators Fiscal during the previous three years; that (condescendence 6) all the expenses of criminal administration within each county other than those undertaken by the Exchequer continued chargeable on the rogue money until the passing of the County General Assessment Act, 1868, by which the rogue money was abolished and the county general assessment, which was directed to be raised by the Commissioners of Supply, was substituted therefor; that (condescendence 7) s. 3 of the said County General Assessment Act enacted the following salaries, fees, outlays, and expenses, namely—(1.) The salaries or fees of clerks, treasurers, collectors, auditors, and other officials necessarily employed in conducting the affairs of each county, together with the necessary outlays of such officials in so far as not covered by their salaries or fees. (2.) The salaries or fees are necessary outlays of Procurators Fiscal in the Sheriff and Justice of Peace Courts and clerks of Justice of Peace Court in so far as such salaries, fees, and outlays are at present in use to be paid by each county. (3.) The expenses incurred in searching for, apprehending, subsisting, prosecuting, or punishing criminals. (6.) All expenses occasioned by damage done to property within the county by tumultuous or riotous assemblies, and all expenses properly incurred in the prevention of riots. (7.) All expenses or payments presently directed by any Act of Parliament to be defrayed out of the rogue money, in so far as any of such salaries, fees, outlays, and expenses are not by law or usage payable or provided from other funds than those raised by the Commissioners of Supply, may be defrayed by the said Commissioners out of the county general assessment to be made and levied by them in terms of this Act.

To the above the appellants answered that (answer 7) at the date of the Treasury Minute (May 15, 1851) all payments by way of fees or salary by the county of Lanark to the Procurators Fiscal in that county ceased, and from that date down to the

present time the county had paid no fees or salary to the Fiscal with the exception of some fees paid between April 30, 1852, and April 30, 1857, for proceedings taken under the Lunacy Acts. The present Lunacy Act came into operation on January 1, 1858, and since that date these payments had entirely ceased; that in several years between 1851 and 1860 the predecessors in office of the present respondent rendered accounts for services in addition to their salary, but payment of these was always refused by the appellants' predecessors, and were not insisted on by the Fiscals; that the last payment made was a payment for outlays made in 1863, and said payment was made ex gratia and under protest that the rogue money was not liable, and upon the footing that no further or other charges were to be made or insisted on, and that the respondent's predecessor acquiesced in this; that the first claim since then for remuneration similar to that now demanded was made in 1898, when after an interval of forty-seven years the Procurator Fiscal of the Sheriff Court at Hamilton made a claim for remuneration for services similar to that now made by the respondent; that that claim the appellants refused to admit; that when the County General Assessment Act of 1868 was passed and rogue money was abolished the payment of fees, salaries, outlays, or expenses by the county to the Fiscals had, with the exception of the Lunacy fees above mentioned, been in desuetude for a period of seventeen years, and no salaries, fees, outlays, or expenses were in use to be paid to the Procurator Fiscal of the county of Lanark by said county at the time of the passing of the said Act; that at that date the whole salaries, fees, outlays, and expenses of the Procurator Fiscal were by law and usage payable or provided from Exchequer, and the various Procurators Fiscal appointed thereafter accepted office upon the footing that their salaries from the Exchequer covered their whole claims for remuneration, or, at all events, that they had no claim to any remuneration from the county funds.

The respondent further alleged that (condescendence 8) the Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50),

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s. 11, transferred the whole powers and duties of the Commissioners of Supply with certain exceptions not affecting the matter under consideration to the county councils, and provided (s. 26) that all their debts and liabilities should become debts and liabilities of the councils, and be defrayed out of the like funds out of which they would have been defrayed but for the passing of the Act, and that the rates referred to in the Act as the "consolidated rates" should be levied for general county purposes; that the Act also provided (s. 89) that "all expenses lawfully incurred by the Commissioner of Supply of the county should, so far as they were at the passing of the Act payable out of the county general assessment, continue to be so payable, and the county council of the county should make provision for such payment accordingly. That (condescendence 9) in the year from January 1, 1898, to December 31, 1898, the respondent had done a large amount of such work, which was set forth in the account lodged.

The appellants, after alleging that the great majority of the cases charged for arose within the city of Glasgow, which was the second point in the appeal, further made answer (answer 9) that in the great majority of the cases the charges made by the respondent had nothing to do with crime; that the work charged for, if done by the respondent, either formed part of the ordinary duties of his office of Procurator Fiscal at the time of his appointment, or was done by him in virtue of special statutory provisions or instructions from the Crown Office imposing the duties upon the Procurator Fiscal; that in neither case was he entitled to remuneration out of the county assessments; and that the respondent had held his present office for sixteen years, during the whole of which time he had been doing work of the class detailed in his account, and he had only now for the first time made a claim against the county for remuneration in addition to his salary from Exchequer.

A proof had been allowed in the Court of Session, and the parties relied on regulations made by successive Lord Advocates and upon numerous Minutes of the Treasury and

Commissioners of Supply which it is not necessary further to refer to.

The Second Division of the Court of Session on December 2, 1902, gave judgment in favour of the respondent, Lord Young dissenting. (1)

1904. March 7, 8, 10. *Haldane, K.C.*, and *Henry Johnston, K.C.* (with them *A. H. B. Constable*), (the two latter of the Scottish Bar), for the appellants. The respondent's claim for 7*s.* 6*d.* for each inquiry the appellants have, at least since 1851, refused to pay. This amount was not paid seventeen years before the Act of 1868; therefore it was "not in use to be paid." The Procurator Fiscal was and is paid a salary by the Exchequer, and this salary includes this work. The Act of 1868 is conclusive of the question. The second point, namely, whether Glasgow was liable, does not arise unless this appeal is dismissed.

[They also referred to the Rogue Act, 1724 (11 Geo. 1, c. 26), the Glasgow Act, 1891 (54 & 55 Vict. c. cxxx.), s. 36, sub-s. 6, the Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50), s. 105, and for certain information to *County Council of Dumfries* v. *Phyn* (2), and to certain Treasury Minutes which it is not necessary to further refer to.]

Ure, K.C., and *T. B. Morison* (both of the Scottish Bar), for the respondent. There was a valid liability on the county council to pay for this work on the part of the respondent. Preliminary inquiries made by the respondent in cases unreported to the Sheriff were excluded from his salary, and some one must pay for this work, and all the other counties in Scotland except Lanark and one or two others do so. The words of the Act of 1868, "are at present in use to be paid," plainly apply to what was the general rule, and these words are satisfied by the fact that in some counties fees were paid and in others salary. The claim really falls under sub-s. 3 of the Act.

[They referred to *MacArthur* v. *County Council of Argyll*. (3)]

Henry Johnston, K.C., in reply.

(1) 40 S. L. R. 117. (2) (1895) 22 R. 538, n., 547.
(3) (1898) 25 R. 829.

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EARL OF HALSBURY L.C. My Lords, it appears to me that this judgment ought to be reversed. In my opinion, the whole question is concluded by the Act of 1868, and it requires but a very short recital to shew how the matter arises. Whether these payments for services were or were not included in the form of rogue money under the Act of 1724, whatever they were they were transferred to the Commissioners of Supply in 1832; and then when we come to the Act of 1868 we find that the power of levying rogue money upon the freeholders of the county was abolished, and in lieu thereof, the obligation, whatever it had been before that time, now arises under, and must be referred to, the enactments of the Act of 1868.

My Lords, I am not absolutely sure that it is necessary to go beyond that Act, because it seems to me that the Act itself is sufficiently clear in its terms; but in so far as it may receive any exposition from the course of dealing and from considering what are the things referred to in the Act of 1868, it appears to me that they all tell the same story. The charges which at one time, whatever they were, lay upon the county were from time to time being to some extent relieved by subventions from the State; and one can understand that there was a general desire to substitute remuneration by salary for the uncertain, and in some respects very objectionable, mode of payment by fees in respect of particular services. Whatever may have been the controversies, it cannot be doubted that from the year 1851 down to the year 1868 there had been efforts by the persons filling these offices to enhance their emoluments. I do not think it is necessary to consider whether the case made by those officers was in accordance with justice or not; no doubt it was thought that it was right to do what was done. But really when we are considering what was in fact enacted in the year 1868, beyond rendering intelligible what was the subject-matter that was being dealt with, I think the history of previous transactions is somewhat unimportant, and I must say in that point of view I entirely and thoroughly agree with Lord Young, who says that he declines to look at the Treasury Minutes, letters by the Lord Advocate and Queen's and Lord Treasurer's Remembrancers and so forth,

because in the view that he takes (and I entirely agree with his Lordship) what is to be regarded is what is now the law as enacted by the statute of 1868.

Now, my Lords, what does that statute enact? First of all, by the 2nd section (it has been altered by subsequent legislation, but it is immaterial to go into that) the power to levy this rogue money is abolished. It starts, therefore, with a new provision for this public service, whatever that is, and it then goes on to say that there shall be paid to the clerks and a certain number of officials enumerated therein the amount that is their due, whatever that may be, and that is absolute. It provides for the expenses—that also is not in dispute. But then it goes on—and in the light of what I have been saying it is intelligible—there were various modes of payment, and there were various rates of payment, I suppose, and it goes on to say in plain terms that the power to make the rate which is by this statute substituted for the power to make a rate for rogue money shall be limited (for it is manifestly a limit) to the fees, salaries, &c., "in use" in "each county." Now when I apply this Act to the facts to which it is to be applied it is not denied, and cannot be denied, that at the date of the passing of the statute, and for seventeen years before it, no such fee or salary, whatever it is to be called, had been "in use" in any of these counties, or at all events in the county of Lanark. It seems to me that that is decisive of the whole question.

We are here dealing with the county of Lanark. A subsidiary question which arises about the difference between the county of Lanark and the Royal Burgh of Glasgow situated within it, does not arise unless we decided the other way; and to my mind that whole question (it has been argued, as it seems to me, at somewhat inordinate length, and upon considerations with reference to questions which really are not in issue here and need not have been entered into) is determined by the plain language of the statute itself.

The notion appears to have been entertained that these fees were by law leviable, and that therefore, though as a matter of fact they were not paid, that would make no difference. The view upon which the Court in Scotland appears to have arrived

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at its decision is that as they were payable by law, therefore you may treat them as having been paid within the meaning of the statute, although they were not paid at the time it passed. The question of the fallacy of that argument would arise, if there were any doubt entertained about its being a good argument in point of law, upon the assumption that the facts were other than they are. In point of fact, you have to assume that this was a fee lawfully payable at that date: that is an assumption for which I think there is not the smallest amount of foundation. The circumstance that any fee resembling this can be paid does not arise in this case; that payment which alone is put forward as a justification for it is payable only under circumstances which, it is admitted, do not exist. How, therefore, it is possible to suggest that the theory that it was payable by law, though it was not in fact paid, satisfies the language of the statute, is a mystery which I am not able to comprehend. At all events, to my mind it is enough to say that, according to the statute, which I think is incapable of being misunderstood, the plain test of what is to be paid, and, what is more important, the test of what the county council has a right to pay, even if they wished, is to be limited by that which at the date of the passing of the statute was "in use" in the county of Lanark. It seems to me that that being the test, the only answer that can be made is that this was not paid, and that it was not "in use" in the county of Lanark at that time. Therefore, it is impossible to say that this debt, which the conclusion of the summons asks to be included in the declaration and the decree, has been established by the argument to be due. Therefore, I move your Lordships that the judgment appealed from be reversed, and that the respondent do pay to the appellants the costs both here and below.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I agree that the statute of 1868 is conclusive.

LORD DAVEY. My Lords, I also agree, and it seems to me that this case is capable of being disposed of on comparatively simple considerations.

In the first place, my Lords, I ask myself, What is this action? It is an action for a debt which is alleged to be due from the county council of Lanark to the respondent, Mr. Hart. Well, in an action for debt the debt must be established either by contract, or at common law, or by statute. There was certainly no contract to pay this money; it is not contended that there was any contract by the county council to pay this money. Nor is there any rule of common law which makes it payable. But it is said that it is payable by statute, and the way in which that is attempted to be made out seems to me rather an extraordinary method of proceeding. It is said in the first place that the Rogue Money Act—which, I observe in passing, I agree with Lord Young was merely an enabling Act giving a discretion to the freeholders of the county—it said that that Act was an Act which imposed upon the county the duty of paying for all charges of criminal administration. That seems to me, I confess, rather a strained construction of the Act, but I will assume that that is the construction of it which had been sanctioned by long usage, and had become part of the law while the Act was in existence. However, the mode in which the expenses of the criminal administration of the county are to be paid for is left in the discretion of the freeholders of the county. By the Act they are not obliged to pay fees for such matters as are the subject of the claim in the present case, but they may arrange a scale by which they will remunerate or give a subvention towards the remuneration of the Procurator Fiscal, and provide for the expenses of criminal administration in such a way and on such terms as they may think fit.

Well, my Lords, having established that these particular fees were a charge, as I think the learned judges say, upon the rogue money, then we come to the Act of 1868. I will not repeat the language in which that Act is expressed; it has been stated by my noble and learned friend on the Woolsack. I will only observe this, that if they bring it in at all under that Act it must be under the 2nd sub-section, the one that deals with salaries and fees, because I agree with the learned counsel Mr. Johnston in his reply that the other section relating to

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searching for criminals deals only with expenses and not with salaries or fees. There are two conditions then with which any claim for salaries or fees under that Act must comply: one is that they must have been "in use" "by each county"—the county of Lanark in the present case—at the time of the passing of the Act; and the other is that they must be such as are not provided for otherwise by law. Unless those conditions are complied with, as has been already pointed out, the county have no power to pay this demand at all, even if they desired to do so. Now, my Lords, I am satisfied that the condition relating to the payment being "in use" at the time of the passing of the Act has not been complied with; and I am not satisfied that the other condition as to its not being provided for out of other funds has been complied with either.

My Lords, the evidence seems to me to fall far short of any payment having been formerly made to the Procurator Fiscal in respect to these matters under the Rogue Money Act. We have no evidence anterior to the year 1845 that any such payments for reading reports of the police or of others, and with or without directing further inquiries marking them "no proceedings," had ever been allowed as a proper subject of a fee, and it appears to me therefore that it would have been an exceedingly proper and reasonable view for the freeholders of the county, or the Commissioners of Supply, to take, to say, "We will pay the proper and sufficient fees for all work done which results in the prosecution of a criminal, or which results in a report to the Crown counsel, or to the Sheriff, or to the Lord Advocate, as the case may be; but for any preliminary inquiries or proceedings which are abortive, and which result in nothing at all, and are not of sufficient importance ever to come before those great functionaries, we will not allow any fee." It appears to me that that would be a very reasonable way of providing for the remuneration of the Procurator Fiscal, and why the county should not have done that, if it thought fit to do so, I am at a loss to understand.

Now, my Lords, how does the matter stand upon the facts before us? In the year 1845 Sheriff Alison drew up a new scale of fees, and he pointed out, as indeed was pointed out

afterwards in some documents in evidence, the abuses that had arisen from the charges for these preliminary inquiries which ended in nothing, without any proper authority, but said it was so important that the Procurator Fiscal should not be prevented from inquiring into cases of sudden death and suspicious cases generally, that he would allow for preliminary inquiries of that nature, provided they were authorized by the information of the Sheriff or Sheriff Substitute, but under no other circumstances. Whether that was acted upon or not I do not know. In the year 1851 some change was made in the remuneration of Procurators Fiscal, so far as it was allowed by the Exchequer. I think the Sheriff cases were paid for by the Exchequer, and I think the payments for unreported cases, that is, cases which did not come before the Crown counsel and were conducted by the Procurator Fiscal on his own responsibility, were allowed, provided that there was either a trial or a summons or libel. From that date the county refused to pay for such matters as are now in question, and no attempt was made by the Procurator Fiscal, if he had a right to do so, to compel them to pay them. From 1851 to 1868, when the Assessment Act came into force, there is no instance of fees of this character having been allowed in the Procurator Fiscal's accounts. Under these circumstances I am at a loss to see how it can possibly be said that in this county it was "in use" to pay these fees at the date of the passing of the Act.

My Lords, I entirely agree with the observations which were made by my noble and learned friend upon the words of the Act; they are to my mind quite free from difficulty or ambiguity; they are "which are 'in use' to be paid," not "which the county is liable to pay," but "which are at present in use to be paid by each county." That is to say, what you have to look at is the practice at the time when the Act came into operation, and I entirely agree with what was put so forcibly and strongly by Lord Young in his judgment, that really this consideration is conclusive of the whole matter, because if it be so, then there is no power in the county council of Lanark to pay these fees, even if they wished to do so.

My Lords, it is unnecessary for me to express any opinion on

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the other point, whether they could pay these fees relating to Glasgow, but if it were necessary to do so the respondent would have some difficulty in satisfying my mind that the Lord Advocate or the Treasury had any power to impose what was at that time a new charge upon the county council by transferring the burden of criminal prosecutions of the graver character from the shoulders of the city of Glasgow on to the county, as was done, I think, in the year 1856; but I may not be accurate in the date.

LORD JAMES. My Lords, I concur.

LORD ROBERTSON. My Lords, I agree that the appeal must be allowed.

My judgment rests on a very simple ground—in fact, on the ground which has been stated by my noble and learned friend on the Woolsack. The measure of the county's liability was limited in 1868 to the Fiscal's fees, in so far as those fees were then in use to be paid by the county; and no such fees as are now in dispute had in fact been paid by Lanarkshire for seventeen years prior to 1868, that county denying liability. The statute clearly makes the state of matters in each county de facto in 1868 the criterion of future liability for that county, in the matter of Fiscal's fees, and during this long argument I have heard no plausible suggestion by which a use of payment can be conjured up out of seventeen years' non-payment. Nor do I find it possible to discover an extension of the county's liability for fees in the general words about expenses which form the third head of s. 4, the specific matter of Fiscal's fees having been separately, and in expression exhaustively, dealt with in the second head.

I purposely abstain from expressing any opinion as to (1.) whether the work now sued for fell de jure within the Act of 1724 and was not legally payable by the county prior to 1868; and (2.) whether that work is not within the duty of the Procurator Fiscal and may not rightly be considered as such by his paymasters. This last is not hujus loci, and it depends upon administrative criminal arrangements which are in the very competent hands of the Sheriff and the Lord Advocate.

LORD LINDLEY. My Lords, I also am of opinion that this appeal ought to be allowed. The point appears to my mind to be a very simple one. The key to the whole controversy lies in the remuneration which is claimed by the Procurator Fiscal. He is not claiming a salary, he is not claiming a fee, he is not claiming an outlay; he is claiming a remuneration for his own loss of time, and what he has to do is to bring that within the scope of the Act of 1868. It appears to me that it is absolutely impossible for him to succeed in that task. There are two relevant clauses of s. 3 of that Act. The first does not apply, for the respondent is not claiming fees "in use" in the county of Lanark in 1868. I see no possible method of getting over that difficulty, except that which was adopted by the learned judges in Scotland who have departed from the words of the Act, and have substituted for "in use" "liability to pay" which they got out of the Rogue Money Act. His claim does not come under the third clause, for, as I said before, he is not claiming for any "expenses" incurred. That is the short answer to his claim.

Order appealed from reversed and respondent to pay the appellants the costs both here and below.

Lords' Journals, March 10, 1904.

Agents for appellants: *Grahames, Currey & Spens, for Bruce, Kerr & Burns, W.S., Edinburgh.*

Agents for respondent: *William Robertson & Co., for Webster, Will & Co., S.S.C., Edinburgh.*

[PRIVY COUNCIL.]

J. C.* 1903 Dec. 16. 1904 Feb. 3.

MASTER AND OWNERS OF SS. "CITY OF LINCOLN" . . . . . } DEFENDANTS;

AND

SMITH . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Unseaworthiness at Starting—Personal Negligence of Owner in Lading—Charterparty.

Unless the conditions of a charterparty relieve the owner as distinct from his servants and agents from the consequences of personal negligence, he is liable if his ship, in other respects seaworthy, is rendered unseaworthy in being so laden under his orders as to become topheavy at starting, with the result that her deck cargo was partly jettisoned and partly swept overboard in a gale which otherwise could have been weathered in safety.

APPEAL from a decree of the Court of Appeal (July 31, 1901) affirming (save as to the amount of damages) a decree of Beaumont J. in the Circuit Court of Durban (April 30, 1901).

The questions raised by the appeal were whether the steamship *City of Lincoln* was seaworthy when she started on a voyage from the port of La Plata to the port of Natal, or unseaworthy as found by a majority of the jury, and whether, assuming that the *City of Lincoln* was unseaworthy, the owner of the cargo was entitled, under the circumstances stated in the judgment of their Lordships, to recover his loss from the shipowner, having regard to the terms of the charterparty and bills of lading under which the cargo was carried.

Beaumont J. in summing up stated his view of the law to be that, notwithstanding exceptions, there must be primarily and originally an actual and implied warranty in every contract for carriage by sea that the ship is seaworthy, and in every respect fitted to carry the particular cargo which she undertakes to carry. But an owner may by the contract exempt

* *Present:* LORD MACNAGHTEN, LORD LINDLEY, SIR ARTHUR WILSON, and SIR JOHN BONSER.

himself from all liability upon the warranty. The question to be determined was whether upon the exceptions of the charterparty the owner had contracted himself out of the warranty of seaworthiness. The ship was chartered on December 1, 1899, and in his opinion was put under the orders of the charterers from the date of the charter. By clause 32 of the charterparty, the owner repudiated any liability for unseaworthiness which might result after the ship went into the hands of the charterers. In law, however, there was an exception to every exception of this nature in contracts of freight that the excepted perils must not be brought about by want of care on the part of the shipowner, and if it could be shewn that he had not taken proper precautions and due care in ensuring the seaworthiness of the ship, the exception would not avail him. In the judge's opinion the shipowner was free in this case from all liability in respect of anything which might have been done after the date of the charterparty. But in view of the possibility of an appeal he prepared a series of questions which he left to the jury. On the answers of the jury he gave judgment for the respondent for 8331*l.*

In appeal the Supreme Court reduced the damages to 7450*l.* The Court held that there were no words in the charterparty expressly exempting the shipowner from the consequences of his own negligent acts as distinguished from those of his servants. Under the charterparty all that the charterer secured was the use of the ship for one voyage, and the control and management of the vessel as well as responsibility for seaworthiness when she sailed remained undisturbed.

W. S. Robson, K.C., and *D. Stephens*, for the appellants, contended that on the evidence the ship was seaworthy at the commencement of her voyage, and that the loss sued for was caused by the perils of the sea, and was covered by the exceptions in the charterparty and the bills of lading. There was no evidence of any negligence on the part of the appellants which disentitled them to rely on the exceptions. They cited *Anglo-Argentine Live Stock and Produce Agency, Ld.* v. *Westall.* (1)

(1) Unreported.

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Sir Robert Reid, K.C., Scrutton, K.C., and *C. Salter*, for the respondent, contended that there was evidence on which the jury could reasonably find unseaworthiness at starting by reason of insufficient ballast to counteract the weight above the water line; and that the loss of goods was caused thereby and not by stress of weather. There was no provision in the charterparty or bills of lading which exempted the owner from the consequences of his own negligence to which the absence of ballast or dead weight was due.

Robson, K.C., replied.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal in the name of the master and owners of the SS. *City of Lincoln* from an order of the Appeal Court in Natal. The order appealed from upholds a verdict and, subject to a variation in the assessment of damages which were ultimately fixed at 7450*l.* 2*s.*, affirms a judgment obtained in the Durban Circuit Court by the respondent Charles George Smith. The action was brought to enforce a claim for damages for non-delivery of cargo by the *City of Lincoln* in breach of a charterparty dated December 1, 1899, and expressed to be made in Buenos Ayres between W. Samson & Co., "on behalf of the owners," and "T. S. Boadle & Co., charterers." The *City of Lincoln* belonged to W. Samson himself, and this appeal is brought on his behalf. The respondent was represented by T. S. Boadle & Co. The charter provided that the vessel, being tight, staunch and strong, and every way fitted for the intended voyage, should with all convenient speed, being discharged, proceed as ordered by the charterers or their agents to the under-mentioned places, and receive from them, in the port of Rosario, a quantity of hay in export bales; thereafter, in La Plata, a quantity of live stock on deck, which cargo the charterers bound themselves to ship not exceeding what the vessel could reasonably stow and carry over and above her tackle, apparel, provisions and furniture, and being so loaded should therewith proceed to Port Natal, South Africa, and deliver the cargo on being paid a lump sum freight of 6500*l.* The owners were to appoint the

stevedore. The charterers were to have the full reach and burthen of the steamer with the exception of space for 1200 tons of coals for ship's use, which were to be carried in steamer's holds and bunkers. The charter and bills of lading contained a series of exceptions and provisions in favour of the owner. Average, if any, was to be payable according to the York-Antwerp Rules of 1890, which negative any claim in respect of cargo carried on deck.

In pursuance of this charterparty the *City of Lincoln* commenced loading on December 7, 1899, at Rosario. There she took on board some 20,000 bales of hay. She then proceeded down the river and entered La Plata on the 16th, where she took in more hay and fodder and received her cargo of live stock—270 bullocks, 100 horses, and 400 sheep. She started on her voyage on December 21, 1899, leaving Ensenada on the afternoon of that day. She arrived at Port Natal on January 15, 1900, short of her cargo of hay by 578 bales, and without a single one of the bullocks, horses, and sheep shipped by the respondent.

The respondent's case was that the *City of Lincoln*, though in herself and as a ship tight, staunch and strong, and fitted for the voyage, was not properly ballasted, and was therefore unseaworthy when notice was given that she was prepared to receive her cargo and when she started on her voyage; that this unseaworthiness was attributable to negligence or want of reasonable care on the part of the owner himself, and was the direct cause of the loss complained of. On the other hand, the owner maintained that the vessel was properly ballasted and perfectly seaworthy at starting, and, moreover, he contended that, even assuming she was unseaworthy, he was protected from liability by the exceptions and provisions of the charterparty.

The action came on to be tried in April, 1901, before Mr. Acting Justice Beaumont and a special jury of five. The trial lasted several days. There was a good deal of evidence on both sides, oral and documentary, including the depositions of witnesses taken on commission, the captain's diary, the rough log, and the chief officer's log-book. The learned judge seems

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to have been under a misapprehension as to the position of the charterer. He appears to have thought that the vessel was "handed over" to the charterer on the date of the charterparty, December 1, and that from that date she was under his orders, and that the charterer "arranged to his own liking as to the loading of the vessel." He was prepared to hold, as a matter of law, that in any event the owner was excused by the exceptions in the charterparty. But although that was his opinion, he summed up the case to the jury in a manner to which no objection can be taken, and he proposed to the jury a series of questions in framing which he invited the assistance of the learned counsel on both sides.

The material questions put to the jury, with the answers given by them, are as follows:—

(1.) *Q.* Was the SS. *City of Lincoln* as a ship tight, staunch and strong, and every way fitted for the intended voyage at the time she was chartered before she was loaded?—*A.* Yes. (Jury unanimous.)

(2.) *Q.* Was she seaworthy after loading and before leaving dock at Ensenada?—*A.* No. (Majority of jury, 4 to 1.)

(3.) *Q.* If not, in what respects did she become unseaworthy and from what cause?—*A.* She was unseaworthy being top-heavy, having insufficient dead weight in her bottom to counteract the weight above the water line. (Majority, 4 to 1.)

(4.) *Q.* Was the shipowner in any way responsible for such causes, if any, by want of reasonable care on his part?—*A.* Owner is responsible, as he should have seen that more dead weight was put in the bottom of the steamer. (Majority, 4 to 1.)

(7.) *Q.* What were the causes of the loss of cargo?—*A.* The vessel, being in an unseaworthy condition as per answer No. 2, was not able to stand the ordinary rough weather experienced. (Majority, 4 to 1.)

(8.) *Q.* Were such causes due to unseaworthiness at starting or to perils of the sea?—*A.* To unseaworthiness at starting. (Majority, 4 to 1.)

On these findings the learned judge gave judgment for the charterer, observing that but for the condition in the charter,

to which perhaps (he said) he attached too much weight, there could be no doubt the verdict of the jury would be perfectly right.

The opinion of the Supreme Court on appeal was delivered by Mr. Acting Justice Broome in a written judgment which has their Lordships' entire approval. The conclusion at which the Court arrived was that, on the questions of fact, there was ample evidence to support the findings of the jury, and that there was nothing in the charterparty to relieve the owner from consequences resulting from want of reasonable care on his part.

In the argument before their Lordships very little was said about the exceptions in the charterparty. Indeed, that point was hardly open then. It had been practically concluded by what occurred in *Westall's Case*. (1) There a ship was chartered to carry cattle from La Plata to England. The charter was identical in its terms with the charter of the *City of Lincoln*. The ship was overburdened and rolled so heavily that the cattle were lost. Mathew J. held the owner liable. He thought the owner had been personally negligent, and that there was nothing in the charter to excuse him from the consequences of personal negligence. On appeal, both in the Court of Appeal and the House of Lords, it was held that the owner was protected, not because personal negligence was covered and excused by the conditions of the contract, but because there was no case of personal negligence at all. It appeared that at the time when the charter was made and at the time when the vessel was being loaded the owner was in this country. He had left the management of the vessel in the hands of duly qualified and competent persons. Against the consequences of negligence on the part of servants and agents the conditions of the charterparty were a protection. In the present case no one but the owner had anything to do with the loading of the vessel. The charterer had no right to interfere. It was not his province to load or to stow the vessel. His business was to provide a cargo in accordance

(1) *Anglo-Argentine Live Stock and Produce Agency, Ld.* v. *Westall* (unreported).

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with the conditions of the charterparty. To do the owner justice, he did not attempt to excuse himself by throwing the blame on the stevedore or the captain or anybody else. He did not for a moment dispute his responsibility in regard to loading or ballasting. His case was that the ship was properly loaded and ballasted. She was loaded (he said) and ballasted "as proposed." Indeed, he went so far as to declare that he would have no hesitation, in the event of a similar cargo being offered, to load the *City of Lincoln* in the same way and ballast her in the same manner.

The findings of the jury on the questions of fact were impeached in a very able argument on behalf of the appellant, but their Lordships see no reason to differ from the conclusion at which the Supreme Court arrived. Their Lordships have not to decide whether the jury were right or wrong in their view of the facts. They have merely to determine whether there was evidence on which reasonable men properly instructed by the judge could have come to the conclusion at which the jury arrived. It seems to their Lordships that there cannot be any doubt upon that point.

The learned judges of the Supreme Court have given a very accurate history of the voyage and an interesting account of the behaviour of the vessel. As soon as she got into salt water she proved to be strangely and, so to speak, perversely unstable, with a strong list—described as "abnormal"—first to one side and then to the other. The captain was evidently alarmed. In calm weather he took down the topmasts, which is said to be a very unusual proceeding. He shifted the cargo. He did all that a good seaman could do; but his efforts were of no avail. The deck cargo was lost, partly jettisoned and partly swept overboard, in a gale which the *City of Lincoln* could have weathered with perfect safety if she had not been so crank and unstable. That she was unstable is not open to doubt. The question is—To what was the instability due? Various suggestions were made, all more or less plausible. The main tank leaked, it was said; but that was proved to be a mistake. The tank was tested at Natal and found to be perfectly sound. There was an overflow of water when the

tanks were run up; but this water was pumped out afterwards and things were no better. There was some shifting of the coal, and that may have started the crankness. It would be difficult to counteract the mischief once started, especially considering that the tank from which the animals were supplied extended amidships without a division from side to side. A scientific witness—a Mr. James Marjoribanks, called by the owner—proved mathematically that the vessel was perfectly stable. He said that "something must have happened." But what that something was he could not tell. Now it is to be observed that the learned judge was not even asked to put to the jury as a definite subject for their consideration any one of these suggestions which this Board was invited to consider. It may be that some accident did occur to which, if it could have been ascertained, the disaster might have been traced. But it cannot be said that the jury were wrong in accepting the opinion of practical seamen, and in declining to speculate on hidden causes and conjectural mishaps.

There were three witnesses whose evidence seems to be conclusive on the question which their Lordships have to determine. Captain Storm and Captain Reeves were witnesses for the charterers. Captain Cowie was called by the owner. All three were practical seamen, and all independent witnesses. They were at one as to the cause of the disaster. Captains Storm and Reeve were asked to report on the loss of the cargo immediately upon the arrival of the *City of Lincoln* at Port Natal. They did so, and afterwards confirmed their report as witnesses for the plaintiff. Their report concluded as follows: "Our opinion . . . . is that the ship at the time the cattle, sheep, horses, forage, &c., were taken on deck was not sufficiently ballasted so as to counteract the heavy weight of the cargo, cattle, &c., carried on the upper decks. This was proved when the vessel got into salt water, thus raising the centre of gravity, when for the above reason she listed over and shewed her crankness and unseaworthiness. The direct result of this crankness of the ship was the total loss of the deck cargo and live stock, as the ship, being well adapted for the carriage of live stock, she would, with sufficient ballast,

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have carried her cargo in safety to Natal, as she had done on previous voyages."

That passage was read to Captain Cowie in cross-examination. He was asked, "Is that correct?" His answer was, "I think so: the ship is all right if she is properly loaded." Captain Cowie had already expressed a very decided opinion that the *City of Lincoln* was not properly loaded for this voyage. With the cargo she carried she ought, he thought, to have had 1300 tons dead weight in her bottom. The weight she carried on top was excessive, he said, for the weight she had underneath. There was no doubt that the behaviour of this ship shewed the want of weight in her bottom; he would have taken her anywhere, he said, if he loaded her, but "not as she was."

Now Captain Cowie was an exceptionally valuable witness. Not only was he a witness called by the defence, but he actually made the same voyage with a similar cargo at the very same time as the *City of Lincoln*. He commanded the *Julia Park*, carrying cattle from La Plata to Natal. He left La Plata on the same day as the *City of Lincoln*, and arrived at Natal before her without loss. He experienced the same weather. He probably had rather a severer gale to encounter. His course was more southerly, and it seems to be the case that in such a gale as that to which the *City of Lincoln* was exposed, the more south you go the stronger you find the wind. It is not surprising that the jury should have preferred Captain Cowie's experience to the theories and mathematical calculations of Mr. Marjoribanks.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the costs of the appeal.

Solicitors for appellants: *Holman, Birdwood & Co.*
Solicitors for respondent: *Edell & Gordon.*

[PRIVY COUNCIL.]

MINISTER OF PUBLIC WORKS . . . DEFENDANT;

AND

HART AND ANOTHER . . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

J. C.* 1903 Dec. 9. 1901 Feb. 5.

New South Wales Public Works Act (26 *of* 1900), *ss.* 96, 99—*Resumption of Land — Costs of Action for Compensation — Irregular Amendment of Notified Valuation.*

Under s. 96 of the New South Wales Public Works Act the Minister notified in the scheduled form that 9460*l.* was the valuation of land resumed under statutory authority, and subsequently by letter not in scheduled form increased the valuation to 9900*l.* :—

Held, that this letter was a sufficient though irregular amendment of the previous formal notification, and that, the Court having fixed the compensation to be paid at 9900*l.*, the owner must pay the costs as directed by s. 99.

APPEAL from an order of the Supreme Court (Aug. 6, 1902) amending a judgment of the said Court signed on April 21, 1902, in an action brought to recover compensation for land resumed under the Darling Harbour Wharves Resumption Act (1900, No. 10), the proceedings under which are regulated by the Public Works Act (1900, No. 26), and by the Act No. 10.

The judgment was signed after a finding by the Resumption Court that the amount of the compensation to which the respondents were entitled was 9900*l.* It also found a "waiver of formality (if it be strictly necessary) of amended offer." It appeared that the declaration had alleged a formal notification of 9460*l.* as the value of the land; while the plea stated an amended offer of 9900*l.*, which had not been notified in the form prescribed by the schedule.

Upon a rule nisi to enter a verdict for the plaintiffs as to costs, the Full Court held that the Court constituted under the Darling Harbour Wharves Resumption Act had no jurisdiction to determine the question on which the right to costs of the

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD LINDLEY, and SIR ARTHUR WILSON.

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action depended, namely, what was the amount of the notified valuation, and that the findings on that question were a nullity. They ordered that the judgment signed on April 21, 1902, be amended by striking out all the findings as to notification of value, and by converting it into a judgment simply in favour of the plaintiffs for 9900*l.*, interest and taxed costs, thus deciding in effect that the only notified valuation was for 9460*l.*

Asquith, K.C., and *V. Hawkins*, for the appellant, contended that the Resumption Court had jurisdiction to determine, and did conclusively determine, the question as to the amount notified. The Full Court, on the other hand, had no power to amend the judgment of the Resumption Court. The original notification of value was in the form prescribed by the Act, and the amended valuation was the result of negotiation between the parties in which further formality was dispensed with as immaterial, even if in strictness it was required by the Act.

Levett, K.C., and *Wood Hill*, for the respondents, relied upon 9460*l.* being the only valuation which had been notified under the Act and in manner provided thereby. The informal letter of amendment was not a valuation of the land or intended so to be, nor was it notified in such manner as to render it operative upon the costs of the suit. There had been no waiver of irregularity, and under s. 2 of the Public Purposes Acquisition Amendment Act (45 Vict., No. 26), which was the Act in force when the land was taken, the respondents were entitled to the costs of their action.

V. Hawkins replied.

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The judgment of their Lordships was delivered by

LORD LINDLEY. The question raised by this appeal arises from the compulsory purchase of some land in Sydney, and the question is, Who is to pay the costs of an action brought to recover compensation for the land taken? This depends on the statutes of the Colony of New South Wales and on what was done.

The statutes are—(1.) a special Act called "The Darling Harbour Wharves Resumption Act" (No. 10 of 1900), and

(2.) "The Public Works Act" (No. 26 of 1900). This last Act repeals and consolidates former Acts to the same effect, and, although not in force when the land in question was taken, it may for convenience be regarded as the governing Act in the case.

Under these Acts land for authorized works may be resumed (or, as we say, taken) by notification of the Governor published in the *Gazette* (Public Works Act, Part V. ss. 36 to 40). Upon such publication the land vests forthwith in the Minister, who is the constructing authority; and persons claiming compensation (Part V. ss. 94 to 99) are to serve on the Minister within ninety days, or further extended time, particulars of their estate and interest in the land resumed and of their claims for damage.

The Minister (s. 96) is then required to cause a valuation to be made of the land or of the claimant's interest, and to notify to the claimant as soon as practicable the amount of such valuation in the form scheduled to the Act, which is as follows (see Sched. VI.):—

"To A. B., claimant in respect of the land hereunder described, taken under the Public Works Act, 1900.

"Take notice that the land hereunder described, being that in respect of the taking whereof under the authority of the aforesaid Act your claim for compensation has been lodged, has been valued at the sum of £

"Signed A. B., Constructing Authority."

If (s. 97) within ninety days after service of notice of claim the Minister and claimant do not agree, the claimant may commence an action in the Supreme Court against the Minister to recover compensation. Under the Darling Harbour Wharves Resumption Act (s. 6) this action is to be tried in the Supreme Court by a Supreme Court judge and two District Court judges (which Court is to have the powers and duties of a jury), and power is given to the Supreme Court to make rules as to motions for a new trial of any such action.

The Court is to determine the amount to be paid to the claimant. If the amount recovered by him is a sum equal to or less than the amount of the valuation notified to the claimant,

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he is to pay the costs of the action; but if it is a greater sum, the costs are to be paid by the Minister (see Act No. 26 of 1900, s. 99).

In the present case land was resumed (by *Gazette* notification of May 3, 1900) belonging to the respondent Peter Francis Hart, who had built a street of houses thereon. The respondent Frances Faucett Moran is Hart's mortgagee. The land was valued by the Government valuers; and the Minister on December 31, 1900, gave a notice of valuation in the scheduled form, the amount notified being 9460*l.* It appeared from the evidence at the trial that, after receiving the notice of valuation and before taking any proceedings to enforce his claim, Hart, accompanied by Mr. Ferris, a member of the Legislature, went to see Mr. Sievers, the official Government valuer, and asked that the Government valuers should reconsider their valuation. Hart urged that the cost or value of some foundations to the houses and a retaining wall had not been taken into account.

The Government valuers, having considered Hart's request, increased the amount to 9900*l.* Hart requested that the result when arrived at should be notified to Ferris on his behalf. The valuers then reported to the Minister, who thereupon sent to Ferris the following letter:—

"Public Works Department,
"Sydney, February 18, 1901.

"Sir,—With reference to your interview with the Government land valuer respecting the claim of Peter Francis Hart, junior, requesting that the offer of compensation of 9460*l.* for property resumed at Darling Harbour be increased, I am directed by the Minister for Public Works to inform you that he has approved of the payment of 9900*l.* to the claimant in lieu of 9460*l.* previously offered.

"I have the honour to be, Sir,
Your obedient Servant,
Robert Hickson,
Under Secretary and Commissioner
for Roads.

"W. J. Ferris, Esq., M.P.,
"Castlereagh Street."

This letter was received by Hart shortly after it was written, and he communicated it to his solicitors on March 5, 1901. Mr. Hickson, who wrote the letter, referred to it in a letter to Hart's solicitors, and on March 11, 1901, they wrote to Mr. Hickson, saying, "Mr. Hart is not willing to accept the offer made through Mr. Ferris."

No further notification of the sum offered was made, nor was the notification of December 31, 1900, formally amended by substituting the sum of 9900*l.* for 9460*l.* Moreover, it appears from the evidence of Mr. Sievers, the principal Government valuer, that although Mr. Hart's request for an increased sum was considered by Mr. Sievers and his colleagues, they did not make any fresh valuation. His words were: "in making the amended offer we gave way generally to what Mr. Hart stated, but did not increase our valuation."

The whole question before their Lordships turns upon the effect of the foregoing letter of February 18, 1901; but before considering this point it will be convenient to state shortly what afterwards took place.

Hart refused the offer of 9900*l.*, and he and his mortgagees brought an action against the Minister and claimed 16,500*l.* In his declaration he stated that his claim for compensation had been valued at 9460*l.*, and no mention was made of the increased offer of 9900*l.* The Minister put in a plea stating that the amount of the valuation which he caused to be made and notified to the plaintiffs was 9900*l.*, and that this sum exceeded the compensation to which the plaintiffs were entitled. The plaintiffs in their reply denied both statements in the plea.

The action was tried before a judge of the Supreme Court and two District Court judges. Evidence was gone into on both sides, and the Court fixed the compensation to be paid at 9900*l.*, the amount offered by the letter of February 18, 1901. The defendant then signed judgment for the costs of the action. The Court considered that any irregularity in the notification of the 9900*l.* had been waived by the plaintiffs. The judgment was signed on April 21, 1902.

On May 22, 1902, the plaintiffs obtained from the Full Court (Stephen Acting C.J. and G. B. and A. H. Simpson JJ.) a rule

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nisi to enter a verdict for the plaintiffs on the issue as to the notified valuation on the grounds, (1.) that the verdict on the said issue was against evidence; (2.) that the only valuation made and notified to the plaintiffs in accordance with the Act was for 9460*l.*; (3.) that the Court was wrong in holding that the plaintiffs had waived the requirements of the Act as to making and notifying the valuation; and (4.) that the waiver had not been pleaded. The application to make the rule absolute was heard on August 5 and 6, 1902. The Court held that the Darling Harbour Resumption Court had no jurisdiction to determine the question on which the right to the costs of the action depended, namely, what was the amount of the notified valuation, and that the findings of the amended postea on that question were a nullity. They did not hold as a matter of law that the valuation notified on December 31, 1900, could not be informally amended, but held that there had not been in fact any new valuation, and that the letter of February 18, 1901, was not a notice of any valuation. They made an order, dated August 6, 1902, that the judgment signed on April 21, 1902, be amended by striking out all the findings as to notification of value, and by converting it into a judgment simply in favour of the plaintiffs for 9900*l.*, interest and taxed costs, thus deciding in effect that the only notified valuation was for 9460*l.*, and that the Minister should pay the costs of the action. The reasons of the judges are set out in the record.

From this decision the Minister appeals to His Majesty in Council.

Their Lordships are of opinion that the appeal should be allowed. The requirements of the statute were all properly complied with in every matter of substance. There was a proper valuation of the property, and a sufficient notification of the result of such valuation. No further valuation was necessary. The valuers had all the materials for reconsidering the amount of compensation which should be offered, and neither as a matter of business nor as a matter of statutory obligation was any second valuation required. If without any further valuation a fresh notification in the form of the schedule to the statute had been sent in with the sum of 9900*l.* substituted for 9460*l.*, their Lordships can hardly conceive that

any objection could have been taken to it. Certainly none could have been legally sustained.

The objection to the proceedings is thus reduced to a question of form, and form only. No doubt it would have been more regular if the letter of February 18, 1901, had been in the form of the schedule; but it emanated from the proper authority after a sufficient valuation by a properly constituted board of valuers, and on their advice. The letter is open to no ambiguity; it refers to the previous offer, and in their Lordships' opinion the Government could not legally have repudiated that letter even before they formally bound themselves to it by their plea in the action.

In their Lordships' opinion the letter of February 18, 1901, was an amendment of the previous formal notification, and was sufficient. The statutory enactment which refers to the form of the notice to be given of the amount of valuation is s. 96 of the general Act, No. 26 of 1900. That section, no doubt, requires the Minister to inform the claimant "of the amount of such valuation by notice in the form of the 6th schedule hereto"; and the schedule states that the claim for compensation has been valued at £ . There was, no doubt, a non-observance of this form and an irregularity. But it was attributable to the unusual manner in which the Minister was approached by the claimant, who threw the Minister off his guard; and it would be most unjust to allow the claimant to take advantage of this irregularity. But without it he has no case whatever. Under these circumstances their Lordships do not feel compelled by the language of s. 96 to hold that the mere irregularity in form vitiates all that has been done and defeats the evident object of the statute.

Their Lordships will humbly advise His Majesty to reverse the judgment or order appealed from with costs, and to restore the judgment or order of the Darling Harbour Resumption Court signed on April 21, 1902.

The respondents will pay the costs of the appeal.

Solicitor for appellant: *G. M. Light.*

Solicitors for respondents: *Fooks, Chadwick, Arnold & Chadwick.*

[PRIVY COUNCIL.]

J. C.* 1904 March 2.

FITZMAURICE . . . . . APPELLANT;

AND

HESKETH . . . . . RESPONDENT.

ON APPEAL FROM THE CONSISTORY COURT OF THE DIOCESE OF MANCHESTER.

Clergy Discipline Act, 1892, *s.* 2—*Immoral act—Construction.*

Held, that the collection of alms on false and fraudulent pretences is an immoral act within the meaning of the Clergy Discipline Act, 1892.

ON May 11, 1903, the appellant was charged under the Clergy Discipline Act, 1892, with having been convicted on February 19 by the South Port Petty Sessions Court—a conviction subsequently confirmed by the Quarter Sessions Court for the County Palatine of Lancaster—of an ecclesiastical offence, namely, that, being an ecclesiastical person, contrary to the canons and laws ecclesiastical, he did things not appertaining to honesty, in that on February 9, 1903, at Birkdale, he did unlawfully go about as a collector of alms under false and fraudulent pretences then made to certain persons named in aid of the cost of repairs of windows and of paying for a new heating apparatus at St. James' Church, Bolton, and in aid of certain schools, and became and was on the day and at the place aforesaid a rogue and vagabond within the meaning of 5 Geo. 4, c. 83. The second charge was that he was thereby guilty of immoral acts and immoral conduct; the third that he was thereby guilty of an offence against the laws ecclesiastical being an offence against morality.

The Chancellor of the Consistory Court held that the offence committed by the appellant was within s. 2 of the Clergy Discipline Act, 1892; and the Bishop of Manchester, on a notification to him to that effect, sentenced the appellant to

* *Present:* THE LORD CHANCELLOR, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY. *Ecclesiastical Assessors:* THE ARCHBISHOP OF CANTERBURY THE BISHOP OF RIPON, and THE BISHOP OF LINCOLN.

deprivation of the vicarage of the church of St. James, Bolton, and of every other ecclesiastical preferment held by him within the diocese.

Bartley, for the appellant, contended that the offence of which the appellant had been convicted was not an offence against morality according to the true construction of s. 2 of the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), and of the interpretation clause, which refers to the 75th and 109th of the Canons of 1603. Reference was made to *Beneficed Clerk* v. *Lee*. (1)

Cripps, *K.C.*, and *Hansell*, for the respondent, were not heard.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. Their Lordships have no doubt, and they have the assent of the Right Reverend Prelates in that view, that the act with which the appellant was charged is an immoral act within the meaning of the Clergy Discipline Act, 1892, and was properly so held by the Consistory Court.

Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be dismissed.

Solicitor for appellant: *Charles Everett*.

Solicitors for respondent: *Rowcliffes, Rawle & Co*.

(1) [1897] A. C. 226.

[PRIVY COUNCIL.]

J. C.* 1904 Feb. 4.

AMYOT . . . . . APPELLANT;

AND

DWARRIS AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF JAMAICA.

Construction of Will—"Eldest Son of my Sister"—Lapsed Gift.

A gift "to the eldest son of my sister and his heirs for ever" operates in favour of the elder of her two sons living at the date of the will, though he predeceased the testator, in the absence of any contrary intention appearing in the context. As the gift lapsed on the death of the donee, there was an intestacy in favour of the heir-at-law.

APPEAL from a decree of the Supreme Court of Jamaica (Equity) dated May 1, 1903, on a special case agreed to by the parties.

The question was as to the proper construction of a devise contained in the will of Sir Fortunatus William Dwarris, deceased, upon the failure or determination of certain limitations therein expressed in favour of the testator's wife and issue of a plantation and the hereditaments and appurtenances thereto belonging known as Golden Grove situate in the island of Jamaica.

The testator by his will dated October 11, 1822, devised in the events which happened Golden Grove, as follows: "And immediately from and after the decease of my said wife to the eldest son of my sister Frances McKeand Gibney and his heirs for ever, he and they taking and bearing the name of Dwarris." The will did not contain any devise of the residuary real estate.

The first-born sons of the testator's sister Frances McKeand Gibney were William Gibney and George Gibney (who were a twin pair). Both of them were living at the date of the said

* *Present:* LORD MACNAGHTEN, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

will, but they both predeceased the testator without leaving issue.

The next son of Frances McKeand Gibney was John Wallington Bonner Gibney, who was born after the date of the said will and survived the testator. He died on October 25, 1867, prior to the failure of the said limitations under the said will terminating with the life interest of the testator's wife. He attained his full age of twenty-one years, and married, but he died intestate and never had any issue. Her fourth son was the respondent Robert Dwarris Dwarris.

The heir-at-law of the said John Wallington Bonner Gibney was his father William Gibney, who died in the year 1872, having by his will devised and bequeathed all his property to his children, the respondents.

If the testator died intestate as to the ultimate fee simple in Golden Grove, it vested in the appellant as the surviving trustee of the will of the testator's heir-at-law.

The special case submitted the following questions, namely, (*a*) Whether the testator, Sir Fortunatus William Dwarris, died intestate as regarded the fee simple of Golden Grove expectant upon the failure or determination of the said limitations, and, if so, in whom such estate was vested. (*b*) If the testator did not die intestate, whether John Wallington Bonner Gibney died seised under the testator's will of a vested estate of inheritance in fee simple in remainder expectant upon the determination of the said limitations, and whether upon the death and intestacy of the said John Wallington Bonner Gibney such estate vested in the said William Gibney as the heir-at-law of the said John Wallington Bonner Gibney. (*c*) Whether the plaintiff Robert Dwarris Dwarris, on the failure of the said limitations, became and was entitled for an estate in fee simple in possession to Golden Grove in virtue of the limitations contained in the will of the testator Sir Fortunatus William Dwarris in favour of the eldest son of the said Frances McKeand Gibney.

The Supreme Court held that there was no intestacy; that the devise to the "eldest son of my sister Frances McKeand Gibney" was not a devise to her first-born son as persona

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designata, but was a devise to such person as shall answer to the description of eldest son of Mrs. Gibney at the time when the estate in remainder should vest.

The Court further held that the estate in remainder vested in Mrs. Gibney's eldest surviving son at the testator's death. There was nothing in the will which postponed the vesting until the prior limitations were determined, or which favoured the claim of Mrs. Gibney's only surviving son at the date of such determination.

Macnaghten K.C., and *J. Austen-Cartmell*, for the appellant, contended that this view was erroneous, and that an order ought to be made declaring that the testator died intestate, in the events which happened as regards the fee simple of Golden Grove, and that the appellant as representing his heir-at-law was entitled to succeed. Mrs. Gibney's elder twin son answered the description of the person directed to take. The devise lapsed by reason of his death in the testator's lifetime, and consequently intestacy resulted. The rule of construction is that a devise to the eldest son of a person, when such person has an eldest or first-born son living at the date of the will, is a devise to such person as a persona designata. Reference was made to *Bathurst* v. *Errington* (1); *Trafford* v. *Ashton* (2); *Meredith* v. *Treffry* (3); *Re Harris' Trust* (4); *In re Whorwood.* (5)

Norton, K.C., and *Waggett*, for the respondents, contended that, according to the true rule of construction applicable to the case, the person referred to by the testator as "the eldest son of my sister" meant and designated the person who answered that description at the time when the will took effect and the estate in remainder was vested and made the subject of gift. That estate vested in the person so designated at the death of the testator, and the rule of construction as regards this estate contended for on the other side led to intestacy, which ought to be avoided, as inconsistent with the intention of the testator.

(1) (1877) 2 App. Cas. 698, 709.
(2) (1710) 2 Vern. 659.
(3) (1879) 12 Ch. D. 170.
(4) (1854) 2 W. R. 689.
(5) (1887) 34 Ch. D. 446.

Reference was made to *Lomax* v. *Holmden* (1); *Thompson* v. *Thompson*. (2)

Counsel for the appellant were not heard in reply.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The point raised on this appeal is a very short one, and in their Lordships' opinion free from difficulty. The question, such as it is, turns on one passage in the will of Sir Fortunatus William Dwarris. After certain limitations which have failed or determined, he disposed of a property called Golden Grove by giving it in these words: "To the eldest son of my sister Frances McKeand Gibney and his heirs for ever." It appears that at the time when the testator made his will Mrs. Gibney had two sons. There was, therefore, at that time in existence a person answering the description of the "eldest son" of his sister Frances. It was contended that the word "eldest" was not properly applicable to the elder of two persons, and that, if the testator had really meant Mrs. Gibney's first-born son, he would have said "elder," not "eldest." In their Lordships' opinion that objection savours of hypercriticism. If a man has two sons, and only two, the ordinary way of speaking of the first-born, if not designated by name, is to call him the eldest son of so-and-so. There being then a person in existence at the time answering the description in the will, their Lordships are of opinion that that person, though he died afterwards in the testator's lifetime, was the object of the testator's bounty. There is nothing in the context to warrant any departure from the proper and ordinary meaning of the words employed.

All the authorities from *Lomax* v. *Holmden* (1) to *Meredith* v. *Treffry* (3) point in the same direction. The case of *Re Harris' Trust* (4), on which the Appellate Court seems to place some reliance, cannot be regarded as an authority to the contrary. The learned Vice-Chancellor who decided that case was at the time of the decision under a misapprehension as to the operation of the Wills Act. He seems to have thought that

(1) (1749) 1 Ves. Sen. 290.
(2) (1844) 1 Coll. 381, 388; 66 R. R. 109, 113.
(3) 12 Ch. D. 170.
(4) 2 W. R. 689.

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with reference to the objects of testamentary bounty the Act had an effect similar to that which it has "with reference to the real and personal estate comprised in it" (s. 94), an error afterwards corrected by the Court of Appeal in *Bullock* v. *Bennett*. (1)

Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be allowed, and that question 1 ought to be answered by saying that the testator died intestate as regards the fee simple expectant upon the failure or determination of the limitations set out in paragraph 5 of the special case, and that upon the facts stated in the special case the estate is now vested in the appellant.

As an arrangement has been made as to costs, there will be no order as to costs except that the parties are to be at liberty to apply for an order to tax their costs.

Solicitors for appellant: *Parkes & Browne.*
Solicitors for respondents: *Guscotte, Wadham & Co.*

(1) (1855) 7 D. M. & G. 283.

[PRIVY COUNCIL.]

THE ATTORNEY-GENERAL FOR NEW SOUTH WALES . . . . . } INFORMANT.

AND

DICKSON AND OTHERS. . . . . DEFENDANTS.

J. C.*
1904
Feb. 5;
March 2.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Construction of Crown Grant — Confirmation of doubtful Title — Effect of Reservation of Land in Crown Grant — Claim by Crown against registered Title.

In 1826 the Crown granted a charter incorporating certain persons as trustees of clergy and school lands in the Colony, whereby it was declared that "glebe lands" (admitted to include the land now in question) should on the death or resignation of the then incumbents become vested in the corporation.

In 1828 the corporation sold (inter alia) the land in question by auction to D., purporting to act under the charter. The incumbent had previously agreed to resign, but there was no evidence of formal resignation. A confirming grant from the Crown, which was usual in practice, was applied for but not obtained before the sale.

In 1829 the Crown granted certain glebe lands to the corporation, reserving all coast land within 100 feet of high-water mark. The land in question would have passed by the general description, if vested in the Crown, but was within the terms of the reservation. D. was not a party to this grant.

In 1830 the corporation conveyed to D. the land he had purchased in 1828, reciting the grant of 1829, and in that recital referring to "the reservation and conditions" therein contained, but not expressing any reservation or exception in the operative part, and taking a mortgage for part of the purchase-money.

In 1833 the corporation was dissolved, and its property reverted to the Crown under the charter of 1826.

In 1840 D. paid off his mortgage to the Crown and the Crown granted and confirmed to D. in fee the premisses comprised in the deed of 1830. There was no mention of any exception, and the stated acreage would have been short without the coast strip of 100 feet.

Later discussion arose between the Crown and the respondents, who claimed by purchase through D. The respondents were registered as

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* *Present:* LORD MACNAGHTEN, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

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owners in 1887. In 1900 the Crown claimed the coast strip, as having been reserved in 1829 and not included in the grant of 1840:—

Held, affirming the decision of the Supreme Court, that the corporation had no title to grant the land in question, but that the conditions of sale of 1828 might have misled the purchaser, and the conveyance of 1830 was ambiguous, and that the Crown grant of 1840 was intended to remove the doubt, and did confirm to D. the land down to the water's edge.

Quære, whether it was open to the Crown to dispute the registered title.

APPEAL from a decree of a Full Court (July 30, 1902) affirming a decree of the Chief Judge in Equity, which dismissed an information filed to establish the title of the Crown to a strip of land 100 feet wide, immediately above high-water mark of Port Jackson Harbour.

The object of the suit was to establish, under the circumstances stated in the head-note and their Lordships' judgment, the title of the Crown under a reservation contained in a Crown grant of 1829 to the land in question, and to have it declared that the respondents Dickson and Dodds were estopped from denying the Crown's title thereto, and that the certificate of title held by them under 26 Vict., No. 9, was erroneous so far as it applied thereto.

Both Courts dismissed the information, holding that the effect of the Crown grant of August 12, 1840, was to pass to Dumaresq, the predecessor in title of the respondents, the land purchased by him down to high-water mark, free from the reservation of the strip of land contained in the grant of 1829.

Asquith, K. C., and *V. Hawkins*, for the appellant, contended that the grant of 1840 did not on its true construction operate to pass to Dumaresq the title of the Crown to the strip of land in question as reserved by the grant of 1829. They contended that the recitals in that grant were inconsistent with the view taken by the Courts below, and referred to *Attorney-General of New South Wales* v. *Eagar* (1); *Cooper* v. *Stuart* (2); *Attorney-General of New South Wales* v. *Milson*. (3)

(1) (1864) 3 N. S. W. Sup. Ct. Rep. 234, 254.
(2) (1889) 14 App. Cas. 286.
(3) (1895) 16 N. S. W. L. R. 143.

Warmington, K.C., and *R. J. Parker*, for the respondents Dickson and Dodds, contended that upon the true construction of the grant of 1840 the land in question passed to and became vested in Dumaresq. The Courts below were right in construing that grant in reference to the inherent power of the Crown to dispose of Crown lands. It was expressed to be in fulfilment and execution of the contract for sale between the corporation and Dumaresq. That contract it was contended included the strip of land in question. The grant of 1840 must be taken to refer to the parcels in the conveyance of 1830, which contained no reservation, and not to the parcels in the grant of 1829, which did contain a reservation. They also contended that the certificate of title obtained by the respondents (see ss. 33 and 40 of the Real Property Act, 26 Vict. No. 9) included the land in dispute, was conclusive of the title of the respondents thereto, and was binding on the Crown. It has been so held in Victoria: see *Attorney-General* v. *Goldsbrough*. (1) See also *Attorney-General* v. *Love*. (2)

Whinney, for the respondent Williams, the Registrar-General of the Colony.

V. Hawkins replied.

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The judgment of their Lordships was delivered by

LORD LINDLEY. The question raised by this appeal is whether a small strip of land, 100 feet wide, adjoining the sea in Port Jackson, near Sydney, is the property of the Crown or of the defendants. This depends on the true construction of a grant by the Crown to one Dumaresq, dated August 12, 1840. In order, however, to understand this grant, it is necessary to explain the position of the parties to it at that date.

In 1826 a charter was granted by the Crown incorporating a number of persons by the name of "The Trustees of the Clergy and School Lands in the Colony of New South Wales," with power to cultivate, sell, lease, and mortgage any lands which might thereafter be granted to them by the Crown (arts. 15, 17, and 20), and by art. 33 it was granted and

(1) (1889) 15 Vict. L. R. 638, 654. (2) [1898] A. C. 679.

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declared that all lands theretofore set apart within the Colony for the support of the clergy of the Established Church and known by the name of the glebe lands or by whatever other name the same might be known should, from and immediately after the death or resignation of the clergyman then in the occupation or enjoyment thereof, pass to and become vested in the corporation upon the same trusts and for the same purposes as their other estates. By art. 36 the Crown reserved to itself power to dissolve the corporation and to resume all the lands previously granted to it, but subject to all mortgages and contracts for sale previously lawfully made.

It is common ground that the strip of land in question formed part of some glebe lands called St. Phillip's Glebe, and that before February, 1828, arrangements had been made with the clergyman who held them for his resignation. It does not, however, appear when his resignation was formally completed.

It was contended that by virtue of art. 33 of the charter the glebe lands resigned became vested in the corporation by virtue of the charter and without any further grant from the Crown. Perhaps this is so; but there is nothing to shew when on this assumption the lands did become so vested. It is obvious that a grant reciting and recognising the resignation and accurately defining the lands to which the corporation has acquired a title would be useful and prevent disputes; and it appears that such a grant was in fact usually obtained, and was applied for in this case as early as October, 1827. The Government officials promised that proper deeds should be completed upon the receipt from the trustees of some formal document which was required. But no grant was in fact obtained before the sale which it is necessary now to notice.

On February 14, 1828, part of St. Phillip's Glebe was sold by auction by the corporation. The advertisements and conditions of sale stated that a transferable lease for twenty-one years with an option to purchase the fee would be granted to the highest bidder. The advertisements and conditions also contained the following words, namely: "all clauses introduced in the grants to the trustees to be inserted in the leases and

conveyances." It was also stated that lots 1 to 9 of the St. Phillip's Glebe lands adjoined the sea. The strip of land in question formed part of lots 5, 6, 7. Lots 5 and 6, containing about thirty-six acres, were bought by Mr. Dumaresq.

No formal contract for this purchase is produced; but the relation of vendor and purchaser between the corporation and Mr. Dumaresq upon the above terms was then established, and a conveyance by the corporation to him was afterwards executed, as will be stated presently.

In the meantime the corporation obtained a grant of the glebe lands from the Crown. It is dated November 24, 1829. It recites that by certain instructions under the Royal Sign Manual the Government is empowered by the Crown to grant to the corporation certain lands in the Colony and refers to the charter of incorporation, and a grant is made to the corporation of certain lands which are so described as to include the strip in question. But then come words which except it. The words are, "Excepting and reserving to His Majesty" lands for sites of towns or villages or other public purposes, "and also reserving to His Majesty his heirs and successors all such part of the said piece or parcel of land hereinbefore described as may be within 100 feet of high-water mark on the sea coast, or in any creek, harbour, or inlet." Other reservations followed, but it is unnecessary to refer to them.

The effect of this last reservation is not open to any serious controversy. If the strip in question belonged to the Crown at the date of the grant, the strip was excepted from the grant. The word "reserving" would operate as an exception. (1) If, on the other hand, the strip belonged to the corporation under the charter, the reservation would operate by estoppel, and have the effect of a grant by the corporation to the Crown. After accepting this grant the corporation could not successfully claim the strip of land from the Crown. But Dumaresq was not a party to this grant, and any equitable title which he may have acquired was not affected by it.

On July 1, 1830, the corporation conveyed to Dumaresq the lands which he had purchased in 1828, and by the same deed

(1) Shep. Touch. 78 et seq.; Co. Litt. 143 a.

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he mortgaged them to the corporation for part of the purchase-money. The conveyance recited the letters patent of 1826, and the grant by the Crown to the corporation of November 24, 1829, and the resolution to sell the lands comprised in that grant by public auction, and that, as the grant to the corporation had not then been made out, it had been proposed that the conveyances to the purchasers should be delayed until the grant to the corporation had been obtained, and that Dumaresq had become the purchaser of the piece or parcel of land hereafter mentioned, "the same being parcel of the land comprised in the hereinbefore in part recited grant of the 24th November, 1829." The conveyance then went on to convey to Dumaresq thirty-six acres of land, "being parcel of the land comprised in the hereinbefore in part recited grant of the 24th November, 1829, and which said piece or parcel of land intended to be hereby granted and enfeoffed is bounded on the north-east by the water of Port Jackson Harbour." The rest of the conveyance and the remortgage contain nothing material. There is no reservation or exception in this deed, but the grant of 1829 is referred to not only in the description of the parcels, but in the recital, where the property granted by it is described as "bounded as in the said grant . . . . mentioned to hold the same subject to the reservation and conditions in the now recited grant contained." This deed of 1830 is by no means so clear as it should have been. Its legal effect appears to their Lordships to have been that the purchaser only acquired so much of the land described as the corporation itself acquired by the grant of 1829. But the purchaser might very naturally think that the land which he agreed to buy extended to the water's edge, and that the land conveyed to him did the same. Both the particulars of sale and the conveyance of 1830 so describe it, and it is only by reference to the grant of 1829 that any doubt on this point arises.

In 1833 the corporation was itself dissolved, and its property thereupon reverted to the Crown, as provided by art. 36 of the charter of 1826.

On August 12, 1840, Dumaresq paid off his mortgage to the

Crown, and the Crown made the grant which has given rise to this litigation. The grant is not a simple reconveyance of the property mortgaged, which would be the ordinary form if all that was intended was to revest in the mortgagor what he had mortgaged to the corporation.

The Crown not having been the mortgagee, recitals shewing the title of the Crown to the mortgaged property and of the Crown Receiver to receive and give a good discharge for the mortgage money would be quite in ordinary course, and the grant in question contains recitals shewing this. But there are passages in the grant which do more than this and which require attention.

In reciting the conveyance of 1830 the purchase by Dumaresq in 1828 is pointedly noticed, and the parcels conveyed by that deed are described as bounded by the water of Port Jackson, and the operative part of the grant runs thus :—

"Now know ye that in fulfilment and execution of the contract so made and entered into by the trustees of the clergy and school lands aforesaid for the sale and conveyance of the said lands to the said William Dumaresq his heirs and assigns as aforesaid, and in consideration of the payment by the said William Dumaresq of the said several sums of 404*l.* and 32*l.* 12*s.* to the said Oswald Bloxsome as aforesaid on our behalf, we do hereby grant and confirm unto the said William Dumaresq and his heirs all that said parcel of land estimated and accepted as aforesaid to contain thirty-six acres comprised in the hereinbefore in part recited indenture of the 1st July, 1830, and hereinbefore particularly mentioned and described, with the appurtenances thereto belonging to hold the said lands and other hereditaments with the appurtenances thereto belonging unto the said William Dumaresq his heirs and assigns to and for the end, intent, and purpose that the said term of 1000 years therein mentioned for the now residue thereof shall and may henceforth become merged and extinguished in the freehold reversion and inheritance of the said lands and hereditaments so by these presents and the hereinbefore part recited indenture conveyed to or otherwise vested in

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the said William Dumaresq and his heirs as aforesaid, and wholly cease, determine, and for ever become void to all intents and purposes whatsoever."

There is not a word here to shew that the strip of land next the sea was excepted from the lands agreed to be purchased by Dumaresq in 1828 and conveyed to and mortgaged by him in 1830. So far is this from being the case that those lands are described in this grant of 1840 as bounded by the waters of Port Jackson. Moreover if a strip of 100 feet is deducted, thirty-six acres are a considerable overestimate.

The Chief Judge in Equity, before whom the case first came, decided that upon the true construction of this grant of 1840 the strip of land reserved to the Crown in the grant of 1829 was included in the land conveyed to Dumaresq by the Crown in 1840. The Full Court took the same view and affirmed his decision. From this decision the present appeal is brought.

The respondents claim through Dumaresq. He sold to Gibson in 1841, who died shortly afterwards, and the respondents are the trustees of his will and purchasers from them.

After Gibson's death, namely, in 1873, his widow applied to the Crown for permission to purchase and retain the mud flat in front of her land. This was refused. Later, namely, in 1880, being told that the land was not hers, she applied for a rescission of the reservation by the Crown, and ultimately a portion of it was acquired by her trustees from the Crown. In October, 1885, a certificate of title was obtained by Gibson's trustees, but with a note of the reservation of the 100 feet. This led to much correspondence, and ultimately, in November, 1887, the note was removed and Dickson and Dodds, the trustees, were registered as the owners of the land which Gibson bought, including the strip now claimed by the Crown.

In June, 1900, the Crown again claimed the strip of land notwithstanding the registration; and the present proceedings to enforce the claim were instituted on December 12, 1901.

If their Lordships had come to the conclusion that the grant of 1840 had not included the sea frontage, it would have become necessary to consider the very important question whether the

registered title thus acquired was conclusive against the Crown. But their Lordships having arrived at the same conclusion as the Colonial judges as to the effect of that grant, the question whether the Crown is bound by the registered title does not call for decision on the present occasion.

Their Lordships have already stated that in their opinion the grant of 1829 did not convey to the corporation the strip of land in dispute, or leave the ownership of it in the corporation if vested in them before. It remains to consider the other documents.

Great reliance is placed by the Crown on the statement in the conditions of sale in 1828 that the leases and conveyances to the purchasers would contain "all clauses introduced in the grants to the trustees," and it is contended that the purchasers must have known from this that they would not obtain a sea frontage. Their counsel, on the other hand, contends that the statement that lots 1 to 9 adjoined the sea was misleading if the sea frontage of those lots was to be excepted; and that the words relied upon by the Crown, which were general words applicable to all the property, could not be applied to those lots, or, if they could, should be confined to reservations for roads and mines and minerals and restrictions on user which the Crown might think proper to impose. Their Lordships feel considerable difficulty in deciding this controversy. If it was generally known in the Colony in 1828 that Crown grants of lands adjoining the sea always excepted a strip just above high-water mark, the purchaser could not reasonably complain that he was misled. But if there was not any such common knowledge, the purchaser would undoubtedly have great reason to complain if he did not obtain a sea frontage.

The conveyance of 1830 is so worded as to be open to two constructions. The parcels conveyed by it are first of all described as comprised in the grant of 1829, but then they are said to be bounded by the water of Port Jackson. This is perfectly true in one sense, i.e., if the description of the parcels in the grant of 1829 is looked at, but the exception from them is disregarded. The legal effect of the conveyance of 1830, so far as the Crown was concerned, was only to pass the property

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which the corporation had power to grant; but as between the corporation and the purchaser it was so framed as to warrant him in supposing that he had got a grant of land coming down to the water's edge.

Such was the doubtful state of the title to the sea frontage when the Crown made the grant of 1840. This grant is so worded as, in their Lordships' opinion, to remove the doubt to which they have referred, and the frame of the grant leads them to think it was intended to remove this doubt. The grant, in their opinion, conveys the land bought in 1828 down to the water's edge. It might no doubt have been made plainer; but their Lordships concur in the view taken of it by all the judges in the Colony, and they will therefore humbly advise His Majesty to dismiss the appeal. The appellant must pay the costs of the respondents.

Solicitor for appellant: *G. M. Light.*
Solicitors for respondents: *Greenip, Snell & Co.*
Solicitors for respondent Williams: *Snow, Fox & Higginson.*

[PRIVY COUNCIL.]

MOORE . . . . . APPELLANT; J. C.* 1904

AND

BISHOP OF OXFORD. . . . . RESPONDENT. *March* 16, 17.

ON APPEAL FROM THE CONSISTORY COURT OF THE DIOCESE OF OXFORD.

Clergy Discipline Act, 1892, *s.* 2—*Occasional Swearing and Ribaldry.*

Held, that on the true construction of the Clergy Discipline Act, 1892, s. 2, habitual swearing and ribaldry is immoral conduct and an offence thereunder, but it is not established by evidence of occasional use of language of that character.

THIS was an appeal by special leave from a decision of the said Consistory Court convicting the appellant, the vicar of Cowley, near Oxford, of criminal intercourse with one Alice Maud Johnson as charged, and also of an immoral habit of and of offences of swearing and ribaldry as stated in charges 5 and 6. The Chancellor of the said Court had notified the conviction to the bishop, "and that the sentence which should be passed upon the defendant should be deprivation." The 5th and 6th charges were:—

5. The defendant has during the past five years been guilty of an immoral habit within the meaning of the Clergy Discipline Act, 1892, in that he has been habitually guilty of swearing and ribaldry.

6. The defendant has during the past five years been guilty of offences against the laws ecclesiastical (being offences against morality within the meaning of the Clergy Discipline Act, 1892) in that he has habitually been guilty of swearing and ribaldry.

Duke, K.C., and *Cecil Walsh*, for the appellant.

Acland, K.C., and *Snagge*, for the respondent.

* *Present:* THE LORD CHANCELLOR, LORD DAVEY, LORD JAMES OF HEREFORD, LORD ROBERTSON, and LORD LINDLEY. *Ecclesiastical Assessors:* THE ARCHBISHOP OF CANTERBURY, THE BISHOP OF SOUTHWELL, and THE BISHOP OF RIPON.

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March 17. The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. Their Lordships are of opinion that the main charge in this case has broken down. The statements of the only witness who is relied upon for the purpose of proving the charge are, in the opinion of their Lordships, uncorroborated by any conduct, act, or proof, and the charge rests entirely upon the evidence of this witness, who is the accuser herself. Their Lordships do not think it necessary to consider more minutely the conduct of the witness, her account of the commencement of the relations between the appellant and herself being such as probably no Court would accept, and one which, so far as their Lordships know, the Court below did not accept as true. All the Court below had to determine was whether or not immoral relations existed at any time, and in any circumstances, between the parties; and on that point their Lordships are unable to concur with the Consistory Court in thinking that there is any corroboration by the correspondence or otherwise in favour of the accusation which has been made. Apart from any technical rule upon the subject, it would be a most dangerous thing for any Court to allow an accusation of this sort to prevail when there is no corroboration; and probably no Court would be induced to do so. If that observation is true, speaking generally of an accusation of this character, it is certainly not rendered less important in this case by the fact of the witness giving an account of the commencement of the relations between herself and the accused clergyman, which (as has already been said) probably no Court would accept. Brought into contact with a stranger for the first time in her life, she is ravished (according to her statement) almost instantly after being brought up into the room to inspect the repairs that had been made, and yet she made no complaint or real attempt to defend her chastity. According to her own account there was an act of violent connection with her repeated on four separate occasions, and though immediate assistance, or, at all events, opportunities of complaint were at hand, there was no loud cry for assistance on her part—no pretence of any such complaint. In those

circumstances their Lordships find it impossible to confirm the finding that the evidence of the witness, uncorroborated as it is, and discredited by her own version of the transaction, can be accepted as conclusive against the clergyman whom she accuses.

With regard to the other charge, of having been "habitually guilty of swearing and ribaldry," there is a body of evidence relating to three or four occasions, which undoubtedly establishes (as the Court below has found) that on those occasions language was used which certainly could not be defended, and the use of which would be disgraceful to anybody, whether clergyman or layman. But the question upon this part of the case is, whether the defendant was, or was not, guilty of the charge made—and properly made—in pursuance of the Clergy Discipline Act, 1892, s. 2, which speaks of a clergyman "alleged to have been guilty of any immoral act, immoral conduct, or immoral habit," the words "immoral habit" being the words contained in the charge. Where on occasions of considerable provocation words are used, however discreditable and disgraceful to the person who used them—and certainly no words could be too severe in condemnation of language such as that found to have been used by the appellant, even allowing for exaggeration in the views of some of the witnesses who used such words themselves, and attributed them to the appellant—yet the question would still remain whether or not, the clergyman having been proved in circumstances of provocation to have used such words on three or four occasions in the course of three years, it is true to say that he is guilty of the offence contemplated by the statute. The use of language of that sort can hardly be described as an "immoral act" in the sense in which that term is used in the Clergy Discipline Act. Immoral conduct and immoral habit are probably the same thing. What is charged —and in their Lordships' opinion properly charged in accordance with the statute—is that the appellant has "during the past five years been guilty of offences against the laws ecclesiastical (being offences against morality within the meaning of the Clergy Discipline Act, 1892) in that he had habitually been

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guilty of swearing and ribaldry." Their Lordships certainly do not mean to give any countenance to the supposed innocence of the use of such words, even on special occasions of extraordinary provocation. As has been already said, no words are too severe to condemn such language. But the view their Lordships entertain is that the offence contemplated by the statute—namely, of being habitually guilty of swearing and ribaldry—is not made out. Even although the appellant may have sometimes used such language, it is not established that he has been habitually guilty of such conduct. The evidence is spread over a period of three years, and the suggestion on the appellant's behalf is that objectionable language was only used on rare occasions of great provocation.

Under these circumstances their Lordships are of opinion that the appeal ought to be allowed with respect to both charges.

It is satisfactory to their Lordships to find that the views which they entertain are shared by the Most Reverend and Right Reverend Prelates who have been good enough to give them their assistance on this occasion.

Their Lordships desire to add that they entirely concur in the observation of the learned counsel for the appellant that, under the circumstances, the Bishop of Oxford could not have taken any other course in this case than that which he has pursued.

The result, therefore, is that their Lordships will humbly advise His Majesty to allow the appeal; but under the circumstances their Lordships feel that it is not a case in which costs should be given, and there will, therefore, be no order as to costs on either side, either before this Board or in the Court below.

Solicitors for appellant: *Bryant & Hall.*
Solicitor for respondent: *F. M. Mallam.*

[HOUSE OF LORDS.]

WINANS AND ANOTHER . . . . . APPELLANTS; H. L. (E.) 1904 May 10.

AND

ATTORNEY-GENERAL . . . . . RESPONDENT.

Domicil—Domicil of Origin—Abandonment—Acquiring fresh Domicil—Evidence—Onus of Proof.

The onus of proving that a domicil has been chosen in substitution for the domicil of origin lies upon those who assert that the domicil of origin has been lost. The domicil of origin continues unless a fixed and settled intention of abandoning the first domicil and acquiring another as the sole domicil is clearly shewn.

An American citizen left the United States and lived many years in England, where he died, leaving by will a legacy on which the Crown claimed legacy duty, on the ground that the testator had acquired a domicil in England:—

Held, that the onus of shewing a change of domicil was upon the Crown, and (Lord Lindley dissenting) that the proof of a fixed and settled purpose was not clearly made out, and that legacy duty was not payable.

The decision of the Court of Appeal reversed.

WILLIAM LOUIS WINANS was born in the United States in 1823. In 1859 he came to England and lived there in various places until his death in 1897. By his will he bequeathed an annuity to a relative, and the question in this appeal was whether he was at his death domiciled in England. If he was, legacy duty was payable; otherwise not. The Attorney-General having filed an information against the appellants (who were the executors) to recover the duty, Kennedy and Phillimore JJ. held that the testator was at his decease domiciled in England and that the duty was payable. This decision was affirmed by the Court of Appeal (Collins M.R., Stirling and Mathew L.JJ.) Hence this appeal. The arguments turned entirely on the true inference of fact to be drawn from the evidence, which is fully stated in Lord Macnaghten's judgment.

Feb. 8, 9. *Asquith, K.C.* (*Bray, K.C., C. Willoughby Williams*, and *Kekewich* with him), for the appellants, contended that

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the evidence shewed no fixed intention to abandon the domicil of birth and acquire another; or at all events that it was not clearly made out by the Crown, on whom the onus lay.

Sir E. Carson, S.-G., and *Vaughan Hawkins* (*Sir R. Finlay, A.-G.*, with them), for the respondent, contended that the evidence was clear and satisfactory that the testator had a fixed and settled intention to abandon the American domicil and acquire an English one.

Asquith, K.C., in reply.

The House took time for consideration.

May 10. EARL OF HALSBURY L.C. My Lords, the short question here is whether Mr. Winans was at the time of his death domiciled in this country. So far as it is a question of law it is simple enough to state, but when the law has been stated a difficult and complex question of fact arises, which it is almost always very hard to solve.

Now the law is plain, that where a domicil of origin is proved it lies upon the person who asserts a change of domicil to establish it, and it is necessary to prove that the person who is alleged to have changed his domicil had a fixed and determined purpose to make the place of his new domicil his permanent home. Although many varieties of expression have been used, I believe the idea of domicil may be quite adequately expressed by the phrase—Was the place intended to be the permanent home? Now Mr. Winans was an American citizen; he resided in Russia for some time; he had various residences in England, and great sporting leases in Scotland. He married in St. Petersburg a Guernsey lady. He had property in the United States, and he originally came to England upon the recommendation of his medical man. He lived a very long time in England, and if I were satisfied that he intended to make England his permanent home I do not think it would make any difference that he had arrived at the determination to make it so by reason of the state of his health, as to which he was very solicitous. It would be enough that for obvious

reasons he had determined to make England his permanent home. But was that his determination? I confess I am not able very confidently to answer that question either way. I have been in considerable doubt, when I view his whole career, whether he ever intended finally to remain here. He had invented cigar-shaped boats, in which he took a deep interest as inventor, and also as one who meant to travel back to his own country when his boats succeeded.

It may be that your Lordships do not think that he was likely to succeed, but it may confidently be asserted that the inventor thoroughly believed that he would succeed. It is true that great reliance might not only be placed upon his great acquisition of sporting areas in Scotland, but, on the other hand, they were treated by him rather as profit-making investments than because he himself was devoted to sport; but even in this, as in some other parts of his conduct, it is difficult to say that a certain inference could be deduced from what he did. Being a man of enormous wealth, he never made such a home for himself or his family as one would have expected if he had really meant to remain permanently in England. Like all questions of fact dependent upon a variety of smaller facts, it is possible to treat this or that evidence as conclusive, and different minds will attribute different degrees of importance to the same facts.

I must admit that I have regarded the whole history of Mr. Winans' life differently at different stages of the argument, and the conclusion I have come to is that I cannot say that I can come to a satisfactory conclusion either way; but then the law relieves me from the embarrassment which would otherwise condemn me to the solution of an insoluble problem, because it directs me in my present state of mind to consider upon whom is the burden of proof. Undoubtedly it is upon the Crown, and, as I cannot bring myself to a conclusion, either way, whether Mr. Winans did or did not intend to change his domicil, his domicil of origin must remain, and I, therefore, am of opinion that the judgment of the Court of Appeal ought to be reversed.

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LORD MACNAGHTEN. My Lords, there is, I think, hardly any branch of law which has been more frequently or more fully discussed in this House in comparatively modern times than the law of domicil. Difficulties have arisen, and difficulties must arise now and then, in coming to a conclusion upon the facts of a particular case. But those difficulties, as Lord Cottenham said, are "much diminished by keeping steadily in view the principle which ought to guide the decision as to the application of the facts."

Domicil of origin, or as it is sometimes called, perhaps less accurately, "domicil of birth," differs from domicil of choice mainly in this—that its character is more enduring, its hold stronger, and less easily shaken off.

In *Munro* v. *Munro* (1) Lord Cottenham observed that it was one of the principles adopted, not only by the law of England, but generally by the laws of other countries, "that the domicil of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil and acquiring another as his sole domicil . . . . Residence alone," he adds, "has no effect per se, though it may be most important as a ground from which to infer intention." "The law," said Lord Cairns L.C. in *Bell* v. *Kennedy* (2), "is beyond all doubt clear with regard to the domicil of birth that the personal status indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal status of another domicil is acquired." The onus of proving that a domicil has been chosen in substitution for the domicil of origin lies upon those who assert that the domicil of origin has been lost.

"Residence and domicil," as Lord Westbury points out (3), "are two perfectly distinct things . . . . Although residence may be some small primâ facie proof of domicil, it is by no means to be inferred from the fact of residence that domicil results, even although you do not find the party had any other

(1) (1840) 7 Cl. & F. 876; 51 R. R. 103.

(2) (1868) L. R. 1 H. L., Sc. 310.

(3) L. R. 1 H. L., Sc. 320, at p. 321.

residence in existence or in contemplation." Lord Chelmsford's opinion—*Udny* v. *Udny* (1)—was that "in a competition between a domicil of origin and an alleged subsequently acquired domicil there may be circumstances to shew that however long a residence may have continued, no intention of acquiring a domicil may have existed at any one moment during the whole of the continuance of such residence. The question in such a case is not whether there is evidence of an intention to retain the domicil of origin, but whether it is proved that there was an intention to acquire another domicil."

Such an intention, I think, is not to be inferred from an attitude of indifference or a disinclination to move increasing with increasing years, least of all from the absence of any manifestation of intention one way or the other. It must be, to quote Lord Westbury again, a "fixed and settled purpose." "And," says his Lordship (2), "unless you are able to shew that with perfect clearness and satisfaction to yourselves, it follows that a domicil of origin continues." So heavy is the burden cast upon those who seek to shew that the domicil of origin has been superseded by a domicil of choice! And rightly, I think. A change of domicil is a serious matter—serious enough when the competition is between two domicils both within the ambit of one and the same kingdom or country—more serious still when one of the two is altogether foreign. The change may involve far-reaching consequences in regard to succession and distribution and other things which depend on domicil.

To the same effect was the inquiry which Lord Cairns proposed for the consideration of the House in *Bell* v. *Kennedy*. (3) It was this: Whether the person whose domicil was in question had "determined" to make, and had, in fact, made the alleged domicil of choice "his home with the intention of establishing himself and his family there, and ending his days in that country"? In a later case, *Douglas* v. *Douglas* (4), which came before Wickens V.-C., who was an excellent lawyer, and owing to the official position which he long held

(1) (1869) L. R. 1 H. L., Sc. 455.
(2) L. R. 1 H. L., Sc. 321.
(3) L. R. 1 H. L., Sc. 311.
(4) (1871) L. R. 12 Eq. 645.

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peculiarly conversant with cases of this sort, all the authorities were reviewed. The competition there was between a Scotch domicil of origin and an alleged English domicil of choice. The learned Vice-Chancellor thought the case "a peculiar and difficult one." He put the question in this way: "What has to be here considered," he said, "is whether the testator . . . . ever actually declared a final and deliberate intention of settling in England, or whether his conduct and declarations lead to the belief that he would have declared such an intention if the necessity of making the election between the countries had arisen."

My Lords, if the authorities I have cited are still law, the question which your Lordships have to consider must, I think, be this: Has it been proved "with perfect clearness and satisfaction to yourselves" that Mr. Winans had at the time of his death formed a "fixed and settled purpose"—"a determination"—"a final and deliberate intention"—to abandon his American domicil and settle in England?

Considering the amount of Mr. Winans' fortune, which was between two and three millions in marketable securities, and the length of his residence in this country, it is somewhat singular that the evidence offered on the question before your Lordships should be so meagre. There is not a single letter written by or to him, or a memorandum or note of any sort made by him, which bears directly on the point. There is nothing but long-continued residence in England on the one hand and some oral declarations and some words in some legal documents on the other. There is nothing else except such inference as may be drawn from a consideration of Mr. Winans' character and disposition, the life he led here, and the objects which he seems to have had most at heart.

The principal events in Mr. Winans' life may be stated briefly. He was born in the United States in 1823. He lived there till 1850, residing in Baltimore with his father, a railway contractor, and employed in his father's business. Mr. Winans' eldest son, Walter, who was examined in this case, says that when he spoke of Baltimore he always called it "home." In 1850 Mr. Winans went to Russia. He was

employed by the Russian Government, as his father had been, in equipping railways there on the American system. During the Crimean War he rendered assistance to the Russian Government in the construction and the equipment of gun-boats to be used against the enemy—England and England's ally. In Russia he married a Guernsey lady, the daughter of a gentleman also employed by the Russian Government. He had two sons by her. In 1859 his health broke down. There were symptoms of consumption, and he was warned by his doctor that another winter in Russia would probably be fatal. He was advised to winter in Brighton in England. Very reluctantly, under medical orders, he left St. Petersburg and spent the winter in a hotel at Brighton, returning to Russia when the winter was over. In 1860 he took a furnished house in Brighton, No. 2, Chichester Terrace, for a term of five years, determinable at the end of any year. He also took the next house, No. 1, for a term of twenty-one years, determinable at the fifth, seventh, or fourteenth year. He connected the two houses structurally. He held both these houses at the time of his death—the furnished house, No. 2, as tenant from year to year, and No. 1 on a tenancy similar to that on which it was originally taken. From 1860 down to 1870 or 1871 he used to spend the winter at Brighton and about eight months of the year in Russia. In 1870 he gave up his house in St. Petersburg, and took a lease of some shooting in Scotland, apparently for the sake of his sons, for he shot very little himself. From 1871 to 1883 he spent about two months in Russia, two or three months in Kissingen in Germany, and the rest of the year in Brighton, Scotland, or London. In 1883 he ceased to visit Russia, thenceforward dividing his time between Kissingen, Brighton, London, and Scotland. This mode of life continued until 1893. After that date he spent the whole of the year in England—in London, Brighton, and the country. He never bought an estate in England for himself or for either of his sons. As far as he was concerned "he preferred living in furnished houses or hotels"—so his son says.

Two events in his life referred to in the argument have, I

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think, no bearing on the question before your Lordships. In 1877, to please his wife, he bought the Crown lease of a house in Palace Gardens. But he never lived there after 1892. It was shut up, and he tried to dispose of it. When he bought the lease he seems to have made particular inquiries in order to ascertain whether there was anything in the conditions of the lease which might prevent his parting with it at any time he pleased. He never liked to "hamper" himself. Any prudent person would probably have done the same. Then there was his unfortunate experiment in the management and improvement of deer forests in Scotland. He took vast tracts of forest, not, perhaps, altogether for sporting purposes, as sport is understood in this country. After a time he inclosed the ground with miles of fencing to prevent the deer straying. He had a notion that the value of the forest for letting purposes would be much increased by stopping shooting for some years, and allowing the stags a longer term of undisturbed life. However, he got into trouble with the crofters and with his lessors, and he became rather unpopular both with those by whom deer-stalking is highly esteemed and those to whom deer forests are an abomination. He thought, too, he had rather wasted money on the shootings; so he gave up his experiment, and he seems to have got rid of all the Scotch shootings before his death.

My Lords, in the dearth of evidence by written or oral declaration as to Mr. Winans' intentions, it seems to me to be important to consider what manner of man Mr. Winans was, what were the main objects of his existence, and what sort of a life he lived in this country. I think there is a good deal of force in some observations that were made both by Lord Cranworth and Lord Wensleydale in the case of *Whicker* v. *Hume* (1) to the effect that in these days, when the tendency of the educated and leisured classes is to become cosmopolitan—if I may use the word—you must look very narrowly into the nature of a residence suggested as a domicil of choice before you deprive a man of his native domicil.

Mr. Winans was a person of considerable ability and of singular tenacity of purpose, self-centred, and strangely

(1) (1858) 10 H. L. C. 124.

uncommunicative. He was not interested in many things, but whatever he did he did, as his son says, thoroughly. He became completely absorbed in a scheme when he took it up. At the same time he lived a very retired—almost a secluded—life. He took no part in general or municipal politics. He rarely went into society. He had no intimate friends, if, indeed, he had any friends at all, in this country. There is no evidence that he was interested in any charity or charitable or philanthropic institution in England. Although he was on affectionate terms with his two sons, he never let them into his secrets. "He always worked his business himself," his son says, "and never brought us into the business affairs in any way." And although at odd times he mentioned his property in America, he never allowed even his eldest son "to understand much about it."

Mr. Winans had three objects in life. His first object was his health. He nursed and tended it with wonderful devotion. He took his temperature several times a day. He had regular times for taking his temperature, and regular times for taking his various waters and medicines.

Besides the care of his health, there were two other objects which engrossed his thoughts. The first was the construction of spindle-shaped vessels commonly called cigar ships. This form of vessel was, as Mr. Winans asserted, an invention of the Winans family. Many patents were taken out for it both in England and in America. It was claimed that vessels of this type would be able to cross the Atlantic without pitching or rolling. In an application to Congress in the year 1892 Mr. Winans represented himself as attached heart and soul to his country, and asked for protection for a long term of years in consideration of the great expenditure which he and his family had incurred in perfecting the invention, and the vast benefits that would result from it to the people of the United States. Mr. Winans declared his confident expectation that a fleet of spindle-shaped vessels subsidized by Congress would restore to America the carrying trade which had fallen into the hands of England and other foreign nations, secure to America the command of the sea, and make it impossible for Great

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Britain to maintain war against the United States. Such a fleet as he described in his application could, he said, "meet war vessels in open sea near the European side and destroy one vessel after another, so that none of them would be able to reach our shores." In the development of his invention Mr. Winans stated that he had incurred an expense nearly equal to four millions of dollars.

Mr. Winans' confidence in this project remained unshaken to the end of his life, and he kept an office in Beaufort Gardens where a staff of engineers and draftsmen was engaged in working out the problem.

There was another scheme which Mr. Winans hoped to develop and work in connection with his fleet of spindle-shaped vessels. In 1859 a property in Baltimore, about 200 acres in extent, called Ferry Bar, was purchased on behalf of the Winans family originally for the purpose of being used, as Mr. Winans states in a letter of January 31, 1882, "for the service of the sea-going steamers of the spindle-shaped form." The scheme was that the water frontage should be used for wharves and docks, while a portion of the property should be laid out for the building of first-class houses as a sort of Belgravia. There Mr. Winans intended to build a big house for himself and control the undertaking, which would make the property, he thought, when developed, worth one million sterling. Nothing practical came of this scheme, because the members of the family could not agree among themselves how the property was to be developed. So Mr. Winans determined to wait until he could get the whole into his own hands. Then he would develop the property himself in his own way and according to his own ideas. He did not succeed in acquiring the entire interest until just before his death. At the date of his death, his son says, "he was working night and day on it." I find that in the conveyances of the last portion of the Ferry Bar property, which were prepared just before his death, and which are dated June 16, 1897, Mr. Winans is described as "of City of Baltimore, but now sojourning in the City of London, England."

Of course, to us these schemes of Mr. Winans appear wild,

visionary, and chimerical. But I have no doubt that to a man like Mr. Winans, wholly wrapt up in himself, they were very real. They were the dream of his life. For forty years he kept them steadily in view. And one was anti-English and the other wholly American.

It was in connection with these schemes that the latest and clearest declaration of intention was made by Mr. Winans. Mr. H. Montague Williams, who was his solicitor at Brighton, says that about two years before his death—a time which in cross-examination he fixed in the winter of 1895 or beginning of 1896—Mr. Winans entered into rather a lengthy disquisition about the Ferry Bar property. Mr. Winans told him that he was making arrangements for buying the remaining shares in it, that a good deal of it belonged to him, and that he intended when he had done that to go out to America and live in Baltimore and develop the estate there himself. Mr. Williams says he remembers Mr. Winans particularly saying, "If I do that it will be worth a million pounds"; and he adds, "The decided way in which he said 'I shall go out to Baltimore' (or words to that effect) struck me at the time."

The only other circumstance to be mentioned is that in his will dated February 4, 1897, Mr. Winans describes himself as a "citizen of the United States of America."

It was argued on behalf of the Crown that, although Mr. Winans may have been prevented by the state of his health from returning to America when he left Russia, and although he could not have safely attempted the voyage in the latter years of his life, yet there was a time in which he might have ventured to cross the Atlantic in an ordinary liner. The obvious answer is that at that time, when divided counsels and family disagreements prevented the development of the Ferry Bar property, he had no object in going to Baltimore.

Then it was said that the length of time during which Mr. Winans resided in this country leads to the inference that he must have become content to make this country his home. Length of time is of course a very important element in questions of domicil. An unconscious change may come over a man's mind. If the man goes about and mixes in society

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that is not an improbable result. But in the case of a person like Mr. Winans, who kept himself to himself and had little or no intercourse with his fellow men, it seems to me that at the end of any space of time, however long, his mind would probably be in the state it was at the beginning. When he came to this country he was a sojourner and a stranger, and he was, I think, a sojourner and a stranger in it when he died.

On the whole I am unable to come to the conclusion that Mr. Winans ever formed a fixed and settled purpose of abandoning his American domicil and settling finally in England. I think up to the very last he had an expectation or hope of returning to America and seeing his grand schemes inaugurated. To take the test proposed by Wickens V.-C., "if the question had arisen in a form requiring a deliberate or solemn determination," I have no doubt Mr. Winans, who was, as his son says, "entirely American in all his ideas and sympathies," would have answered it in favour of America.

I am therefore of opinion that the Crown has not discharged the onus cast upon it, and I think that the order appealed from ought to be reversed.

LORD LINDLEY. My Lords, Mr. Winans, whose domicil is in question, was born in 1823 in the State of New Jersey, in the United States of America. His father was an American citizen. In what State his father was domiciled when his son was born does not appear. But when his son was a child about three years old, the father and son settled in Baltimore, in the State of Maryland, and there they remained until 1850, when the son left America and went to Russia on business. He never returned to America. After spending some years in Russia he settled in England with his wife and family, and he died in this country in 1897. It is quite unnecessary to consider whether Mr. Winans' domicil of origin was in New Jersey or in Maryland. Whichever it was it was American, as distinguished from British, and the question for your Lordships' determination is whether he lost his American domicil of origin (in whatever State it may have been), and whether, when he died, he had acquired a domicil in this country.

My Lords, I take it to be clearly settled—by the *Lauderdale Peerage Case* (1); *Udny* v. *Udny* (2); *Bell* v. *Kennedy* (3)—that the burden of proof in all inquiries of this nature lies upon those who assert that a domicil of origin has been lost, and that some other domicil has been acquired. Further, I take it to be clearly settled that no person who is sui juris can change his domicil without a physical change of place, coupled with an intention to adopt the place to which he goes as his home or fixed abode or permanent residence, whichever expression may be preferred. If a change of residence is proved, the intention necessary to establish a change of domicil is an intention to adopt the second residence as home, or, in other words, an intention to remain without any intention of further change except possibly for some temporary purpose: see Story's Conflict of Laws, s. 43, and *In re Craignish* (4), *Attorney-General* v. *Pottinger* (5), and *Douglas* v. *Douglas*. (6)

My Lords, the change of residence here is plain enough, and need not be enlarged upon. The difficulty is about the intention of Mr. Winans with reference to the change. The exact time when he made up his mind to settle here cannot be ascertained. There is no document or conversation which enables any one to fix the date. But it by no means follows that when he died it cannot be inferred that he must have abandoned all thoughts of going back to America and settling there, and have gradually become content to make his home in this country without contemplating any change. If this can be established, a change of domicil will be the legal result: *Haldane* v. *Eckford* (7); *Douglas* v. *Douglas*. (8) An intention to change nationality, to cease to be an American and to become an Englishman, was said to be necessary in *Moorhouse* v. *Lord* (9); but that view was decided to be incorrect in *Udny* v. *Udny*. (2)

Intention may be inferred from conduct, and there are

(1) (1885) 10 App. Cas. 692.
(2) L. R. 1 H. L., Sc. 441.
(3) L. R. 1 H. L., Sc. 307.
(4) [1892] 3 Ch. at p. 192.
(5) (1861) 6 H. & N. 733.
(6) L. R. 12 Eq. 643-4.
(7) (1869) L. R. 8 Eq. 631.
(8) L. R. 12 Eq. 617.
(9) (1863) 10 H. L. 272.

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cases in which domicil has been changed, notwithstanding a clear statement that no change of domicil was intended: see *Re Steer* (1), and per Wickens V.-C. in 12 Eq. 644. An expressed intention to return for a temporary purpose, or in some possible event which never happens, will not prevail over a clear inference from other circumstances of an intention to remain: see *Attorney-General* v. *Pottinger* (2), per Bramwell B., and *Doucet* v. *Geoghegan.* (3)

My Lords, I do not propose to refer at length to the details of Mr. Winans' life. They were elaborately brought to your Lordships' attention by counsel, and have been most graphically described by my noble and learned friend who has just addressed the House. There is no real controversy about the facts. The question is what inference ought to be drawn from them. Here I have the misfortune to differ from my noble and learned friends who have just addressed the House. I have arrived at the same conclusion as that arrived at by Phillimore J. and the Court of Appeal. I cannot myself draw any other inference than that which they have drawn: Where was Mr. Winans' home—his settled permanent home? He had one and only one, and that one was in this country; and long before he died I am satisfied that he had given up all serious idea of returning to his native country. He was an American citizen permanently settled in this country. But although so settled he was proud of his nationality and had no intention to change it. He may at one time have looked back on Baltimore as his possible ultimate home, but he had ceased to do so long before he died. In 1880 he proposed to build a house for himself in Baltimore; but this came to nothing, and none of his later schemes for developing his property there were carried out in his lifetime, nor did they involve any change of residence on his part. A dim hope and expectation of being at some time able to return to America when he had succeeded in constructing a ship to his liking—which he never did—is spoken to by his son, but when last does not appear. I can find nothing to displace

(1) (1858) 3 H. & N. 599. (2) 6 H. & N. 747.
(3) (1878) 9 Ch. D. 441.

the only inference which I can draw from Mr. Winans' conduct for the last twenty or twenty-five years of his life.

In my opinion the appeal should be dismissed with costs.

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Orders of the Court of Appeal and Queen's Bench Division reversed with costs here and below: the respondent to repay to the appellants the amount of the legacy duty paid by them: cause remitted to the King's Bench Division.

Lords' Journals, May 10, 1904.

Solicitors: *E. H. Quicke, for H. Montague Williams, Brighton; Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

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McCARTNEY . . . . . APPELLANT;

AND

LONDONDERRY AND LOUGH SWILLY RAILWAY COMPANY, LIMITED . } RESPONDENTS.

Water—Riparian Owner—Railway Company—Abstraction of Water for purposes unconnected with riparian Tenement.

The owner of a tenement adjoining a natural stream has no right to divert the water to a place outside the tenement, and there consume it for purposes unconnected with the tenement.

A natural stream was crossed by a railway line and flowed down to a mill. The railway company claimed the right to insert a pipe into the stream at the crossing (which was the only place where their land adjoined the stream), and to carry the water along their line to a distant tank, and there to consume it in working their locomotive engines along the whole of their railway. If the pipe was used to its full capacity it might not have substantially injured the mill:—

Held, that the railway company were not entitled to carry out their proposal (which was not for purposes connected with the land where it crossed the stream), and that the millowner would be justified in stopping up the proposed pipe.

The decision of the Irish Court of Appeal reversed.

Earl of Sandwich v. *Great Northern Ry. Co.*, (1878) 10 Ch. D. 707, overruled.

FOR the purposes of their railway the respondents in 1861 and 1862 bought land in Ireland near Derry. The railway

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crossed a stream by a culvert, and for about eight feet on each side of the culvert the respondents' land abutted upon the stream, but in no other place. Lower down the stream flows to and is used for working a corn mill of the appellant. In 1901 the respondents inserted a pipe into the stream at the side of the culvert and diverted water (by carrying the pipe along the strip of railway line) into a tank upon land belonging to the respondents about half a mile from the culvert. This land did not abut upon the stream. From the tank the respondents supplied their locomotive engines with water. The appellant having stopped up the pipe, the respondents brought an action against him claiming a declaration of their right to take the water through the pipe, and an injunction. The action was tried by Holmes L.J. without a jury, who gave judgment for the appellant with costs. The King's Bench Division reversed that judgment with costs, and this decision was affirmed by the Irish Court of Appeal (Lord Ashbourne L.C. and Walker L.J., FitzGibbon L.J. dissenting), who declared that the respondents were entitled to take a reasonable portion of the stream for their engines. Hence this appeal.

Feb. 11, 12. *M. Drummond, K.C.*, and *D. S. Henry, K.C.* (*P. Law Smith* with them)—all of the Irish Bar, for the appellant.

S. Ronan, K.C. (Irish Bar), and *S. T. Evans, K.C.* (*John Leech* with them), for the respondents.

Drummond, K.C., in reply.

The House took time for consideration.

May 10. Earl of Halsbury L.C. My Lords, in this case the question arises between a millowner and a railway company, the latter claiming the right to take the water of a stream which the millowner uses to supply the power for his mill. The case was originally tried before Holmes L.J., who decided in favour of the millowner; but the issues between the parties have become a little confused from admissions made on both sides, but which do not appear on the pleadings, or, indeed, by any written admission at all.

The railway company brought an action seeking to restrain the millowner from obstructing the railway company's alleged right in what the statement of claim described as a natural stream. The millowner, in his plea, denied that it was a natural stream, and alleged that such as it was, in fact, it was an artificial watercourse. There was ample evidence of this, and the learned judge who tried the cause found as a fact that it was an artificial watercourse made by the defendant and his predecessors in title, and had been used by him for a long time.

For some unexplained reason this finding has been got rid of, I know not how, and the case has been argued upon the hypothesis that the stream is a natural stream, and another concession made, without pleadings or written admission of any kind, that the action of the defendant in obstructing the plaintiffs' works was justified, unless the plaintiffs possess the right they claimed to abstract and use without in any way returning to the stream as much water as they require for the locomotives on their line of railway up to 15,000 gallons.

Some effort was made in the argument to minimise the amount which the railway company claim to have a right to take, and, indeed, the Court of King's Bench in Ireland preface their judgment by a recital, which is apparently intended to limit the user, but it does not do so, nor, as FitzGibbon L.J. pointed out, is it easy to see what operation that recital can have.

The railway company claim a right to place in the stream a pipe, which, if used to the full capacity, would take 15,000 gallons a day, but of which they say their present requirement would be satisfied with a third of that quantity. Notwithstanding the recital, it appears to me the judgment of the Court of Appeal would entitle them to take as much as they wanted up to the extent of 15,000 gallons. The pipe would take 15,000 gallons per day. The railway company claim to keep their pipe such as it is, together with an admission that they may want more than they at present take; and the Court of Appeal have affirmed the judgment of the King's Bench. But Holmes L.J. also decided that, even if the stream

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were a natural stream, the defendant was entitled to the verdict, inasmuch as the plaintiffs were not entitled to the use of the stream in the manner claimed.

My Lords, I am of opinion that Holmes L.J. was right. It seems to me that any other decision would be in conflict with the decision of your Lordships' House in the case of the *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (1) In that case Lord Cairns, with the complete assent of Lord Hatherley and Lord Selborne, gave an elaborate exposition of riparian rights, which, though not a new decision, was nevertheless supposed to have settled and almost codified the law upon the subject. Now it is necessary to consider what it is the railway company do, because that is what they claim a right to do. By a pipe placed in the stream at a point where they own some land adjoining the stream they fill a tank with water to be used in the boilers of their locomotive engines. The engines, of course, consume the water in the course of their journeys; the railway itself is forty miles in length, but is connected with other railways over which their engines run for a much greater distance.

My Lords, if the question were the reasonableness in respect of quantity, I should think it a most unreasonable thing that the use of a stream passing through a very small area of riparian land should be made to extend to forty miles of country, or wherever else the exigencies of the railway service might require. Speaking of it simply in respect of quantity, I think it more unreasonable than supplying drinking water to an asylum built on the banks, which has been held to be unlawful.

But, in truth, it is not a question of the quantity at all. I now apply Lord Cairns' words, which I think are literally applicable here: "The use which they" (in this case the railway company) "claim the right to make of it is not for the purpose of their tenements at all, but is a use which virtually amounts to a complete diversion of the stream . . . . It is a confiscation of the rights of the lower owner." It is to be observed that Lord Cairns used this language when a water

(1) (1875) L. R. 7 H. L. 705.

company who were riparian proprietors had taken water to supply their customers in a neighbouring town, but in which case it was found, as a fact, that the complaining plaintiffs were not damaged at all.

For another reason the question of damage here has become immaterial. The railway company set up a right to do what they have done. It is not here a question of an injury being so trifling that a Court of Equity will accordingly not interpose by the remedy of an injunction. Here they not only set up a right, but actually ask for a declaration of their right to do what they have done.

My Lords, I have said that the judgment of Lord Cairns had codified the rights of riparian proprietors, and I used that phrase because I do not think there is any novelty in the decision. It certainly has been the law as understood in England for more than half a century. The only part of FitzGibbon L.J.'s judgment (who has admirably dealt with every other part of the case) with which I am unable to concur is that in which he expresses the opinion that Bacon V.-C.'s judgment was right upon the facts proved before him. (1) I cannot agree to that. It may be that the Vice-Chancellor would have been justified in refusing an injunction and leaving the plaintiff to his remedy at law, but unfortunately he uses language which seems to affirm the right of the railway company to carry the water along their line, and justifies this as a riparian use. To this I cannot assent. For the reasons I have given I think this is not a riparian use at all, and, except upon the ground I have suggested, I must say I think the decision was wrong.

I move your Lordships that the appeal should be allowed, that the judgment of Holmes L.J. be restored, and that the respondents do pay to the appellant the costs both here and below.

Lord Macnaghten. My Lords, I prefer the judgment of FitzGibbon L.J., and what now remains of the judgment of Holmes L.J., to the opinion of the learned judges from whom they differ.

(1) *Earl of Sandwich* v. *Great Northern Ry. Co.*, 10 Ch. D. 707.

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Holmes L.J., who tried the case at the Derry Assizes without a jury, rested his decision on two grounds. In the first place he came to the conclusion that the stream about which this litigation has arisen was really an artificial watercourse, and that McCartney and his predecessors in title had had the control and management of it from a point above the proposed intake of the railway company for a period beyond living memory. In the second place, assuming the stream to be a natural watercourse, he held that the thing which the railway company proposed to do was not within the rights attached to riparian ownership.

For some reason or other, which I do not understand, the first ground of decision was abandoned in the Court of King's Bench and in the Court of Appeal. I regret the course that was taken. The matter seems to me to be worthy of serious consideration, and I cannot altogether accept the view of one of the learned judges in the Court of Appeal, who dealt with the question and disposed of it summarily without argument. However, the point is not open now. The appellant must be held to the concession made on his behalf, and the case must be treated as if McCartney's mill-race were to all intents and purposes a natural stream. Even so, if it had not been for the judgment of the Lord Chancellor and the great preponderance of judicial opinion in Ireland, I confess I should have thought the case very plain and covered by authority.

There are, as it seems to me, three ways in which a person whose lands are intersected or bounded by a running stream may use the water to which the situation of his property gives him access. He may use it for ordinary or primary purposes, for domestic purposes, and the wants of his cattle. He may use it also for some other purposes—sometimes called extraordinary or secondary purposes—provided those purposes are connected with or incident to his land, and provided that certain conditions are complied with. Then he may possibly take advantage of his position to use the water for purposes foreign to or unconnected with his riparian tenement. His rights in the first two cases are not quite the same. In the third case he has no right at all.

Now it seems to me that the first question your Lordships

have to consider is, under what category does the proposed user of the railway company fall? Certainly it is not the ordinary or primary use of a flowing stream, nor is it, I think, one of those extraordinary uses connected with or incidental to a riparian tenement which are permissible under certain conditions. In the ordinary or primary use of flowing water a person dwelling on the banks of a stream is under no restriction. In the exercise of his ordinary rights he may exhaust the water altogether. No lower proprietor can complain of that. In the exercise of rights extraordinary but permissible, the limit of which has never been accurately defined and probably is incapable of accurate definition, a riparian owner is under considerable restrictions. The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character.

What the railway company propose to do is to abstract a certain portion of the water of the stream, to carry it along their own property to a tank half a mile off, and then to consume it in working their locomotive engines. They have more than forty miles of railway of their own, and they have running powers over the lines of other companies. They have no intention of restoring to the stream a single drop of the water they mean to abstract, nor is it possible for them, under the circumstances, to do anything of the kind. Is that a user which, though extraordinary, is yet legitimate and permissible? I should say, certainly not. So far as the interests of the lower proprietors are concerned, they mean to efface and blot out, as it were, that portion of the stream which they propose to abstract. They mean to do so for their own gain—to save themselves the expense of paying for the water required for the purposes of their business or gathering it for themselves. And they claim to do this as of right. It seems to me that they might just as well claim to sell the water. And, indeed, Mr. Ronan in his able argument did not shrink from that position. He boldly contended that they would be perfectly justified in selling the water, or doing anything they

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pleased with it, provided the lower proprietor was not practically injured. By way of clenching this argument, Mr. Evans pointed out that the learned judge at the trial expressed no opinion as to the extent to which McCartney's water power would or might be diminished by what the railway company proposed to do. And he succeeded, I think, in shewing that there was no reported case in which the Court had interfered where the injury complained of was so inconsiderable as that which would be likely to occur in the present case. That may be very true, but all the cases to which he referred were cases where the injury complained of was done in the exercise, or assumed exercise, of an authorized and permissible user. That seems to me to make all the difference.

My Lords, I said I thought this case was covered by authority. It seems to me to be entirely covered by the decision of this House in the case of the *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (1) There Lord Cairns (Lord Chancellor) gave a judgment as to the rights of riparian owners so complete and exhaustive that I venture to say no case has since come before the Courts, not excepting the case of *Kensit* v. *Great Eastern Ry. Co.* (2), which might not have been disposed of by the application of one or two sentences taken from it, and that perhaps without any very great loss to the general stock of legal knowledge. The *Swindon Case* (1) presented two aspects. The navigation company sued as canal proprietors with statutory powers. They sued also as riparian owners in respect of a tenement called Wayte's tenement, on which there had formerly been a mill. The waterworks company, who were upper proprietors, had diverted a portion of the stream for the purposes of their business. His Lordship pointed out that such an appropriation of the water did not come within the range of those authorities which deal with cases of extraordinary user permissible under certain conditions. "Those were cases," said his Lordship, "where the use made of the stream by the upper owner has been for purposes connected with the tenement of the upper owner. But the use which here has been made by the appellants of the water, and the use

(1) L. R. 7 H. L. 697, 704, 712. (2) (1884) 27 Ch. D. 122.

which they claim the right to make of it, is not for the purpose of their tenement at all. My Lords, that is not a user of the stream which could be called a reasonable user by the upper owner; it is a confiscation of the rights of the lower owner; it is an annihilation, so far as he is concerned, of that portion of the stream which is used for those purposes, and that is done, not for the sake of the tenement of the upper owner, but that the upper owner may make gains by alienating the water to other parties who have no connection whatever with any part of the stream." Then his Lordship points out that the navigation company as riparian owners had clearly a right to complain of what was done by the waterworks company, if what was so done by them was insisted upon as a thing which they had a right to do. After the claim of right it was impossible, he said, that the Court could do otherwise than decide the issue which was thus raised between the parties. "It is a matter," he added, "quite immaterial whether as riparian owners of Wayte's tenement any injury has now been sustained or has not been sustained by the respondents. If the appellants are right they would at the end of twenty years by the exercise of this claim of diversion entirely defeat the incident of the property, the riparian right of Wayte's tenement. That is a consequence which the owner of Wayte's tenement has the right to come into the Court of Chancery to get restrained at once by injunction or declaration as the case may be." The other learned Lords, Lord Hatherley and Lord Selborne, entirely agreed. Lord Hatherley observed that enough had been made out to justify the interference of the Court of Equity: "a very slight amount of evidence," he added, "of the actual amount of damage done would be sufficient to justify an injunction, and the declaration of right to be made by the Court is absolutely necessary in consequence of the assertion of right made by the appellants." And so this House altered the order of the Court of Appeal by declaring the rights of the navigation company, as owner of Wayte's mill, to the flow of the stream down to their tenement, "subject to the ordinary and reasonable use of the said stream and waters by the riparian owners higher up upon the said stream"; and then there was added an express declaration, which was not to be found in the order of the Court of

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Appeal, to the effect that the proposed user by the waterworks company was not within such ordinary or reasonable use. As riparian owners the navigation company were not injured in the very least in present enjoyment, but yet it was as riparian owners that they were held entitled to this declaration in their favour negativing the pretended rights of their opponents.

My Lords, the question in that case in regard to the rights of the navigation company as owners of Wayte's tenement and the pretended rights of the waterworks company was precisely the same question as that which has arisen in the present case. The railway company claim the right to do that which they propose to do. That was admittedly the question at the trial before Holmes L.J., and therefore it was not incumbent upon McCartney to do more than to shew a very slight case of actual or probable injury. He has shewn a certain amount of injury, not very substantial, I admit, but still I think quite sufficient—sufficient to entitle him to damages at law when a claim of right is set up, and sufficient therefore to entitle him to a declaration in equity. It may well be, if I may refer to a suggestion thrown out by Lord Cairns in the *Swindon Case* (1), that if the railway company had said, "We do not claim a right at all, but what we propose to do is such a trivial matter that it cannot do you any practical injury," the Court might have thought fit not to interfere; but that is not the line which the railway company took. They claimed a right; they admitted that if that issue was found against them their whole case must fail. The question of right was not merely the sole question at the trial. It was really the sole question at issue before the Court of King's Bench and the Court of Appeal. And those Courts have made a declaration of right, but a declaration I think in favour of the wrong party. They have declared in effect that the railway company are entitled to abstract and consume for purposes unconnected with the tenement which gives access to the stream a portion of the waters of the stream which can by no possibility be restored to it. That declaration seems to me to be contrary to principle and precedent.

My Lords, I do not think it necessary to say anything more. But I may venture to remind your Lordships that the law laid

(1) L. R. 7 H. L. 705.

down in this House in the *Swindon Case* (1) was no new doctrine. It is stated clearly and precisely by Parke B. in the Exchequer in *Embrey* v. *Owen* (2), and by Cresswell J. in delivering the judgment of the Court of Common Pleas in *Sampson* v. *Hoddinott.* (3)

I have only to add that in my opinion it would be extravagant to suggest that the system of the Londonderry and Lough Swilly Railway Company and the lines of other companies over which they have running powers form one single riparian tenement, or that the railway company, by virtue of contact with this stream at one point, possess throughout their system, and all through the lines of other companies over which they have running powers, rights analogous to those possessed by persons who dwell on the banks of a river in respect of their riverside property. It may be difficult to say how far the rights of the railway company as riparian owners extend, but they can hardly go to such a length as that.

I am of opinion that the judgments of the Court of Appeal and the Court of King's Bench ought to be reversed, and the judgment of Holmes L.J. restored, and that the respondents ought to pay the costs both here and below. But, in order to prevent any dispute in future, I think it would be well to preface the order by a declaration of opinion that the railway company are not entitled to use the stream in question for the purpose of supplying their locomotive engines with water.

LORD LINDLEY. My Lords, it is not now disputed that the stream from which the railway company desire to take water is, or at all events must be regarded as, a natural and not an artificial stream, nor is it disputed that the railway company are the proprietors of the strip of land on which their line is constructed where it crosses the stream. For a short distance, therefore, the railway company are the proprietors of a few feet of land next the stream. They put down a three-inch pipe by which they intended to draw water from the stream in order to fill a tank some distance off, from which they could supply their locomotive engines with water. This pipe was on their

(1) L. R. 7 H. L. 705. (2) (1851) 6 Ex. 367.
(3) (1857) 1 C. B. (N.S.) 590.

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own land, and the defendant had no right to interfere with it unless he was entitled to do so in order to protect his own water rights as a riparian proprietor lower down the stream, where he had a water-mill. In order, however, to protect those rights he took up the pipe, and it was admitted at the trial that he was justified in what he did if the railway company were not entitled to use the water in the manner proposed. Holmes L.J., who tried the case, held that the defendant was justified in what he did. The Divisional Court took a different view and reversed his decision, and the Court of Appeal affirmed the decision of the Divisional Court, FitzGibbon L.J., however, dissenting.

It was proved at the trial that the defendant's mill was an old mill and required a flow of 7000 gallons of water per minute to work it. To work for one hour, therefore, 420,000 gallons would be required. The total quantity of water reaching the mill in dry weather was about 627,000 gallons per day, and of this quantity 500,000 gallons only came down the stream as far as the mouth of the railway company's pipe. The remaining 127,000 gallons entered the stream lower down. On the other hand, it was proved that the pipe would carry off 15,000 gallons a day if allowed to run unchecked. The railway company gave evidence that they did not want more than 5000 gallons a day, and that they only had ten locomotives a day to fill. But their witnesses admitted that more would probably be wanted shortly. The practical result of the evidence was that in dry weather the defendant wanted all the water he could get, and that if the railway company drew off only 5000 gallons a day his mill would be stopped for less than a minute a day; and that if they drew off 15,000 gallons a day it would be stopped for less than three minutes a day. Holmes L.J. did not apparently decide the case upon the ground that the defendant would sustain serious damage, but on the wider ground that the railway company had no right to take water from the stream for the purpose of supplying their locomotives with water. The Divisional Court and the Court of Appeal were of opinion that the railway company were entitled to take water for their locomotives, provided they did not seriously interfere with the working of the defendant's

mill; and they considered that the interference would be too slight to amount to an infringement of his rights.

The water which the railway company contend they are entitled to take is wanted for use over the whole line, including the little strip of land which immediately adjoins the stream and is crossed by it. But the whole line cannot be regarded as riparian property; and the quantity of water required for use on the short strip which immediately adjoins the stream is too small to be of any consequence to either party. The right to take that much is not worth discussing, and may be conceded; but the concession will not decide the important question which your Lordships have to determine.

My Lords, although the damage suffered, or likely to be suffered, by the millowner is small, yet it is plain that, if the railway company are not entitled to retain and use their pipe as intended, but are nevertheless allowed to do so without interruption for twenty years, they will be infringing the millowner's rights all that time, and will, at the end of the twenty years, gain a prescriptive right to continue such use for ever. Such an invasion of his rights the millowner is entitled to prevent. This has been long well settled. In the note to *Mellor* v. *Spateman* (1) it is said: "Wherever any act injures another's right, and would be evidence in future in favour of the wrong-doer, an action may be maintained for an invasion of the right without proof of any specific injury." This principle has been repeatedly recognised and acted upon in cases involving water rights, e.g., *Sampson* v. *Hoddinott* (2) and *Harrop* v. *Hirst*. (3) The principle must be borne in mind when reliance is placed on judicial decisions in cases in which it was unnecessary to allude to it. The principle was conceded and recognised in *Kensit* v. *Great Eastern Ry. Co.* (4), which was decided on the ground that what was there complained of was not in excess of the defendants' rights and never could grow into a prescriptive right, inasmuch as all the water taken from the stream was returned to it undiminished in quantity and undeteriorated in quality. This was the ratio decidendi of that case.

(1) 1 Wm. Saund. 346 a.
(2) 1 C. B. (N.S.) 590.
(3) (1868) L. R. 4 Ex. 43.
(4) 23 Ch. D. 566; 27 Ch. D. 122.

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The question for your Lordships' decision is, therefore, reduced to this, namely: Will the use of this pipe by the railway company infringe the millowner's rights? Or, in other words, are the railway company entitled to use this pipe for the purposes for which they have put it down? Two cases only have arisen in which the right of a railway company to take water from a stream for its locomotive engines has called for judicial decision. One is *Attorney-General* v. *Great Eastern Ry. Co.* (1), in which Lord Romilly expressed his opinion that a railway company having a line adjoining a stream had no right to take water from it for supplying their locomotives. The other is *Earl of Sandwich* v. *Great Northern Ry. Co.* (2), in which Bacon V.-C. decided that they had. In the first of these cases, which was affirmed by Lord Hatherley (3) the abstraction of the water seriously impeded the navigation of the stream, and Lord Hatherley decided the case on that ground. In *Lord Sandwich's Case* (2) no substantial damage was proved, and the Vice-Chancellor considered that the railway company was entitled to take what water they wanted, so long as they did not inflict any substantial damage on other riparian owners. He held, in short, that the railway company were not exceeding their own rights and were not infringing the rights of the plaintiff. This decision is in favour of the railway company in the present case. I cannot, however, think it right in point of law. It is, in my opinion, impossible to reconcile it with the principles laid down and acted on by this House in *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (4) In that case a water company had bought a mill by a stream, and took water from it to supply a neighbouring town. They were held not entitled to do this, although the plaintiffs, who were lower riparian owners, were not in fact damaged by the defendants' operations. Lord Cairns there stated the law as to the water rights of riparian owners, and it is unnecessary to do more than to refer to his judgment.

The railway company in this case became riparian owners

(1) (1870) 18 W. R. 1187; 23 L. T. (N.S.) 344.
(2) 10 Ch. D. 707.
(3) (1871) L. R. 6 Ch. 572.
(4) L. R. 7 H. L. 697; L. R. 9 Ch. 451.

simply by buying a small strip of land crossed by the stream. They thereby acquired the water rights, whatever they were, of the owner of the land so bought, but they acquired no greater rights than he could give them in respect of that land. These rights did not include the right to take water from the stream for consumption off the land, the possession of which conferred his rights. He could not lawfully take water from the stream in any appreciable quantity and sell it for use miles away, or, indeed, use it himself at a distance from his riparian tenement without returning it to the stream. Such a user can only be justified by a grant from lower riparian owners or by prescription. This I take to be now settled by *Stockport Waterworks Co.* v. *Potter* (1), by the decisions of the Court of Appeal and of your Lordships' House in the *Swindon Case* (2), and by *Ormerod* v. *Todmorden Mill Co.* (3)

The intended use of the water in this case by the railway company was reasonable enough from their point of view, but such use would have been in excess of their rights, and an infringement of the rights of the defendant.

I am of opinion, therefore, that the appeal should be allowed. and that the judgment of Holmes L.J. should be restored, and that the railway company should pay the costs here and below.

Orders of the Irish Court of Appeal and King's Bench Division reversed and judgment of Holmes L.J. restored with costs here and below: declaration that the respondents are not entitled to use the water of the stream for the purpose of supplying their locomotive engines with water: cause remitted to the Irish King's Bench Division.

Lords' Journals, May 10, 1904.

Solicitors: *Greene & Underhill, for Hugh C. O'Doherty, Dublin; William Webb & Co., for James E. O'Doherty, Dublin.*

(1) (1864) 3 H. & C. 300. (2) L. R. 7 H. L. 697; L. R. 9 Ch. 451.
(3) (1883) 11 Q. B. D. 155.

[HOUSE OF LORDS.]

H. L. (E.) 1904 May 13.

ATTORNEY-GENERAL . . . . . APPELLANT;

AND

LORD MONTAGU . . . . . RESPONDENT.

Revenue—Estate Duty—Property passing on Death—Principal Value—Mortgage in Fee by Tenant for Life and Remainderman—Tenant for Life indemnified against Mortgage Debt—Finance Act, 1894 (*c.* 30), *ss.* 1, 2, 7.

A tenant for life of realty joined with the remainderman in mortgaging the realty. The loan was made to the remainderman only, and he alone covenanted for the repayment. He also covenanted to indemnify the tenant for life against the mortgage debt and interest, and assigned another property to secure the indemnity:—

Held, that, in estimating the principal value of the realty for estate duty payable by the remainderman on the death of the tenant for life, no deduction could be made on account of the mortgage debt.

The decision of the Court of Appeal, [1903] 1 K. B. 483, reversed, and the decision of Phillimore J., [1902] 1 K. B. 429, restored.

BY a deed of May 28, 1888, the Ditton property was settled in trust, subject to a life estate of the Dowager Duchess of Buccleuch in the property, to such uses as Lord Montagu and his eldest son should jointly appoint.

By a deed of May 29, Lord Montagu and his eldest son, in consideration of 27,000*l.* lent to them by mortgagees, covenanted with the mortgagees to pay the 27,000*l.* with interest six months thereafter; and the Duchess as tenant for life in possession granted, and Lord Montagu and his eldest son in exercise of their joint power of appointment appointed, the Ditton estate to the use of the mortgagees in fee subject to a proviso for redemption on payment by Lord Montagu and his eldest son of the 27,000*l.* and interest. The interest being at 4 per cent. would amount to 1080*l.* a year.

By another deed of May 29, Lord Montagu and his eldest son covenanted with the Duchess to keep her indemnified against the mortgage debt of 27,000*l.* and interest, and

assigned an annuity and rent-charge secured upon other property (the Clitheroe estate) to trustees to keep down the interest on the 27,000*l.* so that the life estate of the Duchess might be wholly exonerated from and indemnified against the mortgage debt.

The Duchess died in 1895, and, Lord Montagu having claimed to deduct the mortgage for 27,000*l.* from the capital value of the Ditton estate in paying estate duty under the Finance Act, 1894, the Attorney-General filed an information.

Phillimore J. gave judgment for the Crown. The Court of Appeal (Vaughan Williams, Stirling, and Mathew L.JJ.) reversed that decision and dismissed the information. (1)

Sir R. Finlay, A.-G., and *Sir E. Carson, S.-G.* (*Vaughan Hawkins* with them), for the appellant. In estimating the estate duty to be paid on the death of the tenant for life the determining fact is that the life estate of the Duchess as between her and the remaindermen was intact: she enjoyed the whole estate for her life. The mortgagees might have enforced the mortgage against the realty during her lifetime, but she did not covenant to pay the mortgage debt and was completely indemnified by the remaindermen against it. That is the whole point. The case falls under s. 1 or s. 2, sub-s. 1 (*b*) (or under the combined operation of both sections), of the Finance Act, 1894, and also under s. 7, sub-s. 7 (*a*). The Court of Appeal went wrong in supposing that the case was governed by *Earl Cowley* v. *Inland Revenue Commissioners* (2) (a wholly different case), and by what Lord Davey there said. Here the whole estate passed on the Duchess' death to Lord Montagu. There was a mortgage on it, but it was a mortgage for his benefit, and his only.

Danckwerts, K.C., and *Austen-Cartmell*, for the respondent. What passed to the respondent was the equity of redemption and nothing more, and by s. 1 of the Finance Act, under which alone the case falls, the estate duty is payable only on the principal value of the equity of redemption. The Duchess was mortgagor in possession and liable to have the mortgage

(1) [1903] 1 K. B. 483. (2) [1899] A. C. 198.

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enforced during her life. The respondent on her death got the property subject to the payment of the debt and interest.

S. R. Finlay, A.-G., in reply.

EARL OF HALSBURY L.C. My Lords, in this case, with the greatest respect for the learned judges in the Court of Appeal, I think they have allowed validity to be given to what is mere form and not substance. If one looks at the whole arrangement, the substance of the matter was this—not that there should be a mere contractual relation between the remainderman and the lady who was entitled to this property, but that the property should remain hers as between those two persons, and that she should never have one farthing less than she was entitled to. All the analogies which Mr. Danckwerts has endeavoured to put before your Lordships seem to me to be beside the question.

It may be that the same deed may have a legal operation as between one set of persons, and yet, as between other parties to it, the real substance of the transaction may be such that it cannot be treated as if it had its full legal operation. That, I think, is the case here. As between the Duchess and Lord Montagu there never was the relation which is insisted upon by Mr. Danckwerts. It seems to me that Lord Montagu, wanting to borrow money, gets the security of this lady's estate which enabled him to borrow the money; but the parties to the instrument which they executed point out, and I think point out very distinctly, that the effect of it is to be, as between those two persons, that the Duchess is to be entitled for the rest of her life to retain that which she then had, namely, a right to the property and to the results of the property. And she did so. She paid nothing in the way of interest on the mortgage, and she received the rents and profits. As between those two persons, looking at that instrument, I think that it effected nothing, although it afforded security to the persons who lent the money. But the notion of its not being liable to estate duty when that transaction comes to an end, and when the whole of what she had goes back to Lord Montagu, seems to me to be a very forced con-

struction of these legal instruments which are effective for the object that they were designed to effect, but which never were intended to pass the estate itself out of the Duchess.

Under those circumstances, with great respect to the Court of Appeal, I am of opinion that the true question was that which was put by my brother Phillimore. He said that what she had to give up, what she relinquished by her death, was the thing that she enjoyed during her lifetime.

That being so, it seems to me that the Crown is perfectly right in the contention which it has set up. I therefore move your Lordships that the judgment be reversed.

LORD DAVEY. My Lords, I am of the same opinion.

I adhere to everything which I am reported to have said in *Lord Cowley's Case* (1), and in particular to the passage from my judgment on which the Court of Appeal relied in the decision which they have given. If this were a simple case of a mortgage by a tenant for life and a remainderman, or by successive tenants for life and the ultimate remainderman, I think that the property would pro tanto be taken out of the settlement as, from the date of the mortgage and on the death of the first tenant for life, the estate duty could be claimed only on the equity of redemption. But there appear to me to be circumstances in the present case which take it out of that rule. I am not prepared to say—and it is not necessary to express an opinion—whether, if there had been a mere indemnity, such, indeed, as the law would imply from the fact of the mortgage being for the benefit of the remainderman, if there were a mere personal covenant of indemnity to the Duchess (to take this concrete case) by Lord Montagu and his son, I am not prepared to say whether that would be sufficient or not. I do not say that it would not be, and I do not say that it would. But in this case it appears to me that we have far more than that. We have what in my opinion amounts to an express contract by Lord Montagu and Mr. Montagu with the Duchess that under no circumstances, although she had at their request joined in the mortgage in order to effect a mortgage of the fee,

(1) [1899] A. C. 198, 218-221.

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should she be called upon to pay anything out of the income of her Ditton property; and provision was made by which, in case any such claim were made upon her, she might have recourse to another fund which was charged for the purpose. The arrangement between the parties was, in fact and in truth, that the Duchess should continue to enjoy the whole income of the Ditton estate discharged, as between her and those entitled in remainder, from any liability by reason of her having joined in the mortgage.

What then was the property which passed on the death of the Duchess? First I will take it under s. 1. It is admitted that the equity of redemption at any rate passed—that is to say, the property subject to the mortgage. But did the residue of the property pass upon the death of the Duchess? Now, if the true transaction between the parties was that, as between themselves, the mortgage should not effectually attach to the estate until the Duchess' death, then I think it may fairly be said that the whole property passed under s. 1. But supposing that not to be so, and I quite admit that there is a little technical difficulty about it, I am quite satisfied that the property passed under the combined operation of s. 1 and s. 2. As regards s. 1 the equity of redemption, that is the property subject to the incumbrance, passed undoubtedly under s. 1; but as regards s. 2 it appears to me that so much of the income of the Ditton estate as represented, or was equal to, the interest on the mortgage comes exactly within s. 2, sub-s. 1 (*b*). If I am right in the views which I have expressed as to the effect of the arrangements between the parties, the Duchess had a beneficial interest, notwithstanding the mortgage, in the whole of the income, including the 1080*l*. a year, which was equivalent to the interest on the mortgage. She had as between her and Lord Montagu an undoubted beneficial interest to receive and to retain without incumbrance or charge upon it that portion of the income.

Sect. 2, sub-s. 1 (*b*), is this: "Property in which the deceased or any other person had an interest ceasing on the death of the deceased." Now I think that portion of the rents which was equal to 1080*l*. a year was property in which

the Duchess had an undoubted beneficial interest ceasing on her death. Then the sub-section says that that property is to be deemed to pass—to what extent?—"to the extent to which a benefit accrues or arises by the cesser of such interest." Lord Montagu thereupon acquired the benefit of receiving that sum of 1080*l.* a year for the purpose of discharging his mortgage interest. He was under liability for the interest on the mortgage during the Duchess' lifetime, but he now receives a fund out of which he will be enabled to discharge that interest. In my opinion that is "a benefit which accrues or arises" to him. The property represented by that 1080*l.* a year, if it did not pass under s. 1, is to be deemed to pass under s. 2.

My Lords, to complete the case I may as well point out that to determine the value which is to be deemed to pass, s. 7, sub-s. 7 (*b*), provides that "if the interest extended to less than the whole income of the property" the value of the benefit accruing shall be "the principal value of an addition to the property equal to the income to which the interest extended." So that quacunque viâ I am of opinion that, whatever technical difficulties there may be and whatever was the form of the conveyancing which the parties assumed for the purpose of carrying out the transaction, the Crown is entitled to say that the whole value of the Ditton estate either passed or should be deemed to have passed either under s. 1 or s. 2.

My Lords, I confess if there were any difficulty in this view—which I think there is not—I should have thought it was quite open to your Lordships to say that if the 1080*l.* a year is to be deemed to be a charge upon the Clitheroe annuity, then the case is as broad as it is long, because if Lord Montagu is relieved from the payment of estate duty on the ground that the estate to the extent of the mortgage did not pass by the Duchess' death, he would still remain liable to pay an equivalent amount of duty in respect of the cesser of the annuity he created out of the Clitheroe estate for the Duchess' indemnity.

I am, therefore, of opinion that the appeal should succeed and that the judgment below should be reversed.

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LORD JAMES. My Lords, I concur in the results which have been arrived at by my noble and learned friends who have addressed your Lordships' House.

No doubt there was in form a mortgage—a mortgage that was good as between the mortgagor and the mortgagee; and I accept Mr. Danckwerts' admission that there was only beside that mortgage a contractual obligation; but I differ from his submission that that contractual obligation cannot affect the estate passing on the death of the tenant for life. It seems to me that the contractual obligation did affect the estate, because it relieved the tenant for life from bearing any of the burden of the mortgage. The result is that in substance there was, as between the tenant for life and the remainderman, no mortgage, and that by the death of the Dowager Duchess of Buccleuch the tenant for life, Lord Montagu, obtained the estate without the mortgage affecting him, or at all events obtained the benefit of it to a greater degree than during her life. He had then to bear the burden of the mortgage. By the death of the tenant for life he has become seised of the estate and receives the benefit of it which he did not receive before. Therefore, my Lords, I concur in thinking that the judgment appealed from ought to be reversed.

LORD ROBERTSON. My Lords, I entirely concur.

Order of the Court of Appeal reversed and decree of Phillimore J. restored with costs here and below: cause remitted to the King's Bench Division.

Lords' Journals, May 13, 1904.

Solicitors: *Solicitor of Inland Revenue; Nicholl, Manisty & Co.*

[HOUSE OF LORDS.]

SAMUEL . . . . . APPELLANT;

AND

JARRAH TIMBER AND WOOD PAVING CORPORATION, LIMITED . . . . . RESPONDENTS.

H. L. (E.) 1904 May 16.

Mortgage—Stock—Limited Company, Mortgage by—Clog on Equity of Redemption—Option to purchase Mortgaged Stock.

A mortgagee is not allowed at the time of the loan to enter into a contract for the purchase of the mortgaged property.

A limited company borrowed money upon the security of their debenture stock subject to the lender having the option to purchase the stock at 40 per cent. within twelve months; the loan to become due and payable with interest at thirty days' notice on either side. Within the twelve months and before the company gave notice of their intention to repay the loan, the lender claimed to purchase the stock at the agreed price:—

Held, that the option was void, and that the company was entitled to redeem the loan on payment of principal, interest, and costs.

The decision of the Court of Appeal, [1903] 2 Ch. 1, affirmed.

THE following statement of the facts is taken from Lord Macnaghten's judgment:—

By letter dated June 11, 1901, the appellant Henry Samuel offered to advance to the respondent company 5000*l.* at 6 per cent. upon the security of 30,000*l.* first mortgage debenture stock of the company, subject to his having "the option to purchase the whole or any part of such stock at 40 per cent. at any time within twelve months." Other conditions were attached to the offer, but they are not material for the purpose of the present question. Then followed this provision: "The advance to become due and payable with interest at thirty days' notice on either side."

The offer was accepted by the company. The stock was duly created and registered in Mr. Samuel's name.

Within the period of twelve months, and before the company gave notice of intention to repay the advance, Mr. Samuel claimed to purchase the whole of the mortgaged stock at the

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agreed price. Thereupon the company brought this action, asking for redemption and a declaration that the option was illegal and void.

Kekewich J. gave judgment for the company, declaring that the stipulation giving the appellant an option to purchase was void, and that the company was entitled to redeem and have the stock transferred on payment of whatever was due for principal, interest, and costs, with consequential relief. (1) This decision was affirmed by the Court of Appeal (Collins M.R., Romer and Cozens-Hardy L.JJ.). (2)

Feb. 16. *P. O. Lawrence, K.C.* (*J. W. Manning* with him), for the appellant. The agreement constituted no fetter on redemption. It was not a sale of the mortgaged property, but an option given to the mortgagee which could only be exercised "during the currency" of the agreement. This differentiates the case from *Noakes* v. *Rice* (3) and *Bradley* v. *Carritt* (4), where an onerous covenant was to subsist after payment of principal, interest, and costs. The agreement is independent of the mortgage, and resembles that which was enforced in this House in *Reeve* v. *Lisle*. (5) The equity of redemption is not in any way affected, and there can be no objection to the combination in one instrument of the charge and the option to purchase the debenture stock. This is not a question of the issue of stock at a discount, but of the purchase of existing stock at a price. The bargain was deliberately entered into and was not oppressive; and if it cannot be specifically enforced the appellant is entitled to damages: *South African Territories, Ld.* v. *Wallington*. (6) The excess, if any, is separable, and the option was valid at least whilst the mortgage subsisted.

Warrington, K.C. (*Martelli* with him), for the respondents. The contract is invalid on one or other or both of two grounds: either as a "clog," or as an infringement of the doctrine "Once a mortgage always a mortgage." The mort-

(1) [1902] 2 Ch. 479.
(2) [1903] 2 Ch. 1.
(3) [1902] A. C. 24.
(4) [1903] A. C. 253.
(5) [1902] A. C. 461.
(6) [1898] A. C. 309.

gagor must not be placed in a worse position after redemption than he was before the agreement. *Noakes* v. *Rice* (1) and *Bradley* v. *Carritt* (2) were decided not so much as cases of clog as of the imposition of a burden continuing after the mortgage had been paid off. This agreement expressly provides for such a continuance, as the option extends to "any time within twelve months," whereas the advance is repayable on thirty days' notice.

P. O. Lawrence, K.C., in reply.

The House took time for consideration.

May 16. EARL OF HALSBURY L.C. (read by Lord Macnaghten). My Lords, I regret that the state of the authorities leaves me no alternative other than to affirm the judgment of Kekewich J. and the Court of Appeal. A perfectly fair bargain made between two parties to it, each of whom was quite sensible of what they were doing, is not to be performed because at the same time a mortgage arrangement was made between them. If a day had intervened between the two parts of the arrangement, the part of the bargain which the appellant claims to be performed would have been perfectly good and capable of being enforced; but a line of authorities going back for more than a century has decided that such an arrangement as that which was here arrived at is contrary to a principle of equity, the sense or reason of which I am not able to appreciate, and very reluctantly I am compelled to acquiesce in the judgments appealed from.

LORD MACNAGHTEN. My Lords, both Kekewich J. and the Court of Appeal decided in favour of the company. Having regard to the state of the authorities binding on the Court of Appeal if not on this House, it seems to me that they could not have come to any other conclusion, although the transaction was a fair bargain between men of business without any trace or suspicion of oppression, surprise, or circumvention.

It is, I think, unnecessary to consider what the true construction of the agreement between Mr. Samuel and the

(1) [1902] A. C. 24. (2) [1903] A. C. 253.

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company may be. The result would have been precisely the same if the agreement had in terms declared that the option was not to continue after repayment. The law undoubtedly is that a condition such as that in question, if legal and binding at all, must come to an end on repayment of the loan.

In the Court of Appeal the question was treated as governed by the principle, of which *Noakes* v. *Rice* (1) is a recent example, that on redemption the mortgagor is entitled to have the thing mortgaged restored to him unaffected by any condition or stipulation which formed part of the mortgage transaction.

That principle, I think, is perfectly sound. But, in my opinion, the question here depends rather upon the rule that a mortgagee is not allowed at the time of the loan to enter into a contract for the purchase of the mortgaged property.

This latter rule, I think, is founded on sentiment rather than on principle. It seems to have had its origin in the desire of the Court of Chancery to protect embarrassed landowners from imposition and oppression. And it was invented, I should suppose, in order to obviate the necessity of inquiry and investigation in cases where suspicion may be probable and proof difficult. I gather from some general observations made by Lord Hardwicke in *Mellor* v. *Lees* (2) that he would have been disposed to confine the rule to cases in which the Court finds or suspects "a design to wrest the estate fraudulently out of the hands of the mortgagor," and to cases of "common mortgage"—that is, as I understand it, mortgage of land by deed. It will be observed that in the later case of *Toomes* v. *Conset* (3), which is often referred to for a statement of the rule, his Lordship speaks only of "a deed of mortgage"; an instrument which perhaps rather lends itself to imposition—for no one, I am sure, by the light of nature ever understood an English mortgage of real estate.

In *Vernon* v. *Bethell* (4), however, Northington L.C. (then Lord Henley) laid down the law broadly in the following terms: "This Court, as a Court of conscience, is very jealous

(1) [1902] A. C. 24.
(2) (1742) 2 Atk. 494.
(3) (1745) 3 Atk. 261.
(4) (1761) 2 Eden, 113.

of persons taking securities for a loan and converting such securities into purchases. And therefore I take it to be an established rule that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but to answer a present exigency will submit to any terms that the crafty may impose upon them."

This doctrine, described by Lord Henley as an established rule nearly 150 years ago, has never, so far as I can discover, been departed from since or questioned in any reported case. It is, I believe, universally accepted by text-writers of authority. Speaking for myself, I should not be sorry if your Lordships could see your way to modify it so as to prevent its being used as a means of evading a fair bargain come to between persons dealing at arms' length and negotiating on equal terms. The directors of a trading company in search of financial assistance are certainly in a very different position from that of an impecunious landowner in the toils of a crafty money-lender. At the same time I quite feel the difficulty of interfering with any rule that has prevailed so long, and I am not prepared to differ from the conclusion at which the Court of Appeal has arrived.

I am therefore of opinion that the appeal must be dismissed with costs, and I move your Lordships accordingly.

LORD LINDLEY. My Lords, the letter of June 11, 1901, written by the defendant to the plaintiff company, contained an offer of a loan of 5000*l.* to the company upon certain terms, and this offer and the terms proposed were accepted by the company by their letter in answer, dated June 14, 1901. These two letters constituted an agreement between the parties. The main provisions are as follows, namely: 1. That the defendant should forthwith lend the company 5000*l.* at 6 per cent., redeemable on thirty days' notice by either party. 2. That the defendant should have as security 30,000*l.* of the company's first mortgage debenture stock transferred to him. 3. That

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the directors of the company should elect a nominee of his on their board. 4. That the defendant should have the option of purchasing the whole or any part of such stock at 40 per cent. at any time within twelve months. 5. That he should have a further option, namely, in the event of the company at any time raising further capital or selling its undertaking for shares or stocks of another company, the defendant should have the option of underwriting the taking up of such new capital, or shares, or stocks at a commission of 10 per cent.

The first question is, What is the true nature of this agreement? Is it a mortgage with an option to purchase, or is it a conditional sale? Or is it an agreement giving Samuel an option to hold the debenture stock as a mortgage or a purchase? It appears to me to be clearly a mortgage with an option to purchase. A loan of 5000*l.* on security was what the company wanted, and what Samuel agreed to let the company have on terms. They were not bargaining for anything else. As soon as the 5000*l.* was advanced and the debenture stock was placed at Samuel's disposal he was in the position of mortgagee of that stock. He had the rights of a mortgagee, and the company had the rights of a mortgagor. There was that reciprocity and mutuality of remedies which distinguish a mortgage transaction from a conditional sale and from other transactions more or less resembling a mortgage, but not really constituting a mortgage. The transaction was in my opinion a mortgage, plus, amongst other things, an option to purchase, which if exercised by the mortgagee would put an end to the mortgagor's right to redeem—i.e., would prevent him from getting back his mortgaged property. This was the view taken by Kekewich J. and by all the members of the Court of Appeal, and I am unable myself to view the transaction differently.

In *Lisle* v. *Reeve* (1) Buckley J. suggested some instances in which he considered a mortgagee might validly stipulate for an option to buy the equity of redemption; but although his decision was affirmed first by the Court of Appeal and afterwards by this House (*Reeve* v. *Lisle* (2)), the affirmance proceeded entirely on the fact that the agreement to buy the

(1) [1902] 1 Ch. 53, at p. 68. (2) [1902] A. C. 461.

equity of redemption was no part of the original mortgage transaction, but was entered into subsequently, and was an entirely separate transaction to which no objection could be taken. It is plain that the decision would not have been affirmed if the agreement to buy the equity of redemption had been one of the terms of the original mortgage. (1) The Irish case *Re Edward's Estate* (2) is to the same effect.

I cannot help thinking that both parties intended that the two options to purchase the 30,000*l.* debenture stock and to underwrite further capital or debenture stock if issued were to be exercisable even after payment off of the 5000*l.* But the decisions of this House in *Noakes* v. *Rice* (3) and *Bradley* v. *Carritt* (4) conclusively shew that, whatever might have been intended, Samuel could not have been entitled to exercise either option after repayment of his loan. But these decisions and the previous decision of *Salt* v. *Northampton* (5) emphatically recognise the old doctrine, "Once a mortgage always a mortgage," which is too well settled to be open to controversy. Lord Hardwicke said in *Toomes* v. *Conset* (6): "This Court will not suffer in a deed of mortgage any agreement in it to prevail that the estate become an absolute purchase in the mortgagee upon any event whatsoever." But the doctrine is not confined to deeds creating legal mortgages. It applies to all mortgage transactions. The doctrine "Once a mortgage always a mortgage" means that no contract between a mortgagor and a mortgagee made at the time of the mortgage and as part of the mortgage transaction, or, in other words, as one of the terms of the loan, can be valid if it prevents the mortgagor from getting back his property on paying off what is due on his security. Any bargain which has that effect is invalid, and is inconsistent with the transaction being a mortgage. This principle is fatal to the appellant's contention if the transaction under consideration is a mortgage transaction, as I am of opinion it clearly is.

Then it was contended that, as the property mortgaged was

(1) 2 W. & T. 7th ed. p. 16.
(2) (1861) 11 Ir. Ch. Rep. 367.
(3) [1902] A. C. 24.
(4) [1903] A. C. 253.
(5) [1892] A. C. 1.
(6) 3 Atk. 261.

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debenture stock issued by a limited company, the case did not fall within the principle to which I have been referring. I confess my inability to follow the argument on this point. Debenture stock is usually a sum of money charged on the assets of the company issuing it. It may be redeemable or irredeemable, in which case it is not a mortgage at all. But whether redeemable or irredeemable, it is capable of being made a security for money lent upon it. It can be mortgaged as well by the company which issues it as by an ordinary holder. I can discover no reason for treating a mortgage of debenture stock as something so different from other mortgages as to render the principle "Once a mortgage always a mortgage" inapplicable to it.

In my opinion the appeal ought to be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 16, 1904.

Solicitors: *Dale, Newman & Hood; H. Percy Becher.*

[HOUSE OF LORDS.]

CANNON BREWERY COMPANY, LIMITED . . . . . } APPELLANTS;

AND

GAS LIGHT AND COKE COMPANY RESPONDENTS.

H. L. (E.) 1904 May 17.

Gas—Arrears of Gas Rate—Right to recover from incoming Tenant—Gas-works Clauses Act, 1847, *c.* 15, *s.* 16—*Metropolis Gas Act*, 1860, *c.* 125, *s.* 39—*Gas Light and Coke Company's Act*, 1872, *c. xxiii., s.* 18.

When a consumer of gas supplied by the Gas Light and Coke Company on premises within the company's district leaves the premises without paying for the gas, and the incoming tenant continues the trade or business of the outgoing consumer and pays him a consideration for so doing, the company cannot under its special Act of 1872, c. xxiii., recover by legal process the arrears from the incoming tenant.

The decision of the Court of Appeal, [1903] 1 K. B. 593, reversed, and the decision of Lord Alverstone C.J., Darling and Channell JJ., restored.

Gas Light and Coke Co. v. *Mead*, (1876) 45 L. J. (M.C.) 71, approved.

THE outgoing tenant of premises in the Harrow Road, Paddington, had carried on there the business of a grocer with a wine and spirit licence. He left owing the respondents 10*l.* 1*s.* 3*d.* for gas supplied to him there. The appellants bought his business and goodwill and the lease of the premises, paid the price, and continued the business. The respondents having sued the appellants in the county court at Clerkenwell for the arrears, the learned judge, on the authority of *Gas Light and Coke Co.* v. *Mead* (1), gave judgment for the appellants. This decision was reversed by the Court of Appeal (Vaughan Williams, Stirling, and Mathew L.JJ.) (2), who held that the appellants were responsible for their predecessor's arrears. Hence this appeal. The question turned on the construction of the respondents' special Act, 1872, c. xxiii., s. 18, which is set forth in Lord Macnaghten's judgment.

(1) 45 L. J. (M.C.) 71. (2) [1903] 1 K. B. 593.

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May 5, 6. *C. A. Russell, K.C.*, and *A. H. Spokes*, for the appellants. The error of the Court of Appeal lay in supposing that the words in s. 18 of the company's Act of 1872, "the company shall not *require* from the next tenant of the premises payment of the arrears so left unpaid unless" one of two things happens, mean that if one of those two things does happen the company can recover the arrears by force of law. "Require" does not mean "have the right to sue for." Its natural meaning is enough to account for its presence, namely, require the payment of the arrears as a condition precedent if the incoming tenant desires to be supplied with gas. The appellants did not require a supply of gas. Therefore they need not pay for the arrears.

[The rest of the appellants' arguments are clearly and fully stated in the judgments, and to set them forth again here would be a vain repetition.]

Danckwerts, K.C., and *Roland E. Vaughan Williams*, for the respondents, contended that the judgments of the Court of Appeal were right for the reasons there given, and cited *Paterson* v. *Gas Light and Coke Co.* (1); *Hoddesdon Gas Co.* v. *Haselwood.* (2)

Spokes, in reply.

The House took time for consideration.

May 17. LORD MACNAGHTEN. My Lords, in this case the respondents, the Gas Light and Coke Company, sued the Cannon Brewery Company for arrears of gas rates. The Court of Appeal supported the claim, and gave judgment in favour of the gas company.

The arrears were not attributable to any default on the part of the brewery company. The brewery company had no relations with the gas company in the past. They do not propose or desire to have any relations with them in future. The debt they have been adjudged to pay is not their debt in any sense. It is the debt of the outgoing tenant, whose interest in the premises supplied with the unpaid gas they

(1) [1896] 2 Ch. 476. (2) (1859) 6 C. B. (N.S.) 239.

have purchased, and whose trade or business they are now continuing.

The claim was made on the strength of the following section of the Gas Light and Coke Company's Act, 1872: "18. In case any consumer leave the premises where gas was supplied to him without paying to the company the rate or meter rent due from him, the company shall not require from the next tenant of the premises payment of the arrears so left unpaid unless the incoming tenant agreed with the defaulting consumer to pay the arrears, or unless the incoming tenant shall continue the trade or business of the outgoing tenant, and shall have paid to the owner, lessee, or mortgagee in possession, or to the outgoing tenant of such premises, a consideration for so doing, but the company shall, notwithstanding any such arrears, in the absence of collusion between the outgoing and incoming tenant, supply gas to the incoming tenant as required by this Act on being required by him to do so."

The grounds on which the Court of Appeal proceed are these: Their view is that when the Act says that the gas company shall not require from an incoming tenant payment of arrears left unpaid by the outgoing tenant unless one or other of two conditions is fulfilled, it is necessarily implied that if either of those conditions is fulfilled such payment may be required. Now, it is admitted that the second condition has been fulfilled in the case of the brewery company. The gas company, therefore, they say, are authorized by this Act to require payment of the arrears from the brewery company. Then comes the question, What is the meaning of the word "require"? To solve that question the learned judges of the Court of Appeal turn to the last sentence of the section. And there they find an absolute obligation on the part of the gas company to supply gas to an incoming tenant, notwithstanding the existence of arrears owing by his predecessor in title. The next step is easy enough. As the obligation to supply the incoming tenant is in their opinion absolute and unconditional, it would be idle to tell the gas company that they may require payment of arrears unless power is given to enforce compliance with the demand. Hence it follows that the word "require"

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imports liability on the part of the incoming tenant, and confers a right of action on the gas company.

The result is certainly startling. Gas companies in the metropolis alone of all traders, corporate or unincorporate, are privileged in certain cases to collect debts due by defaulting customers from persons who have never been, and never mean to be, customers of theirs.

The learned judges of the Court of Appeal, in deciding against the brewery company, advisedly overruled a decision of Blackburn J. and Lush J., which was in point and directly contrary to their view: *Gas Light and Coke Co.* v. *Mead* (1), decided in 1876.

There is, however, as Mr. Russell pointed out, one flaw in the reasoning of the Court of Appeal. The learned judges have overlooked a few words in s. 18. The obligation on the part of the gas company to supply gas to an incoming tenant is not absolute or unconditional. It is qualified by the words "as required by this Act." When the history of gas legislation in the metropolis is borne in mind, those words are very significant, and the difficulty created by a provision at first sight indirect and obscure vanishes altogether.

Originally, gas companies in the metropolis were free to extend their works as they pleased. The system of separate districts was unknown. The service of gas was left to the ordinary laws of supply and demand. At length, "in order to economise capital and avoid the two frequent opening of streets," the principal companies, including the Gas Light and Coke Company, agreed to confine their supply of gas to separate districts. This arrangement was confirmed and regulated by the Metropolis Gas Act, 1860. "Districting," to use an expression found in the Act, made a great change in the position of the gas companies. In its own district each company obtained a monopoly. It was therefore necessary in the interest of consumers to place certain restrictions on dealings between gas companies and intending customers. Subject to the provisions of the Metropolis Gas Act, 1860, every gas company was still left free to enter into any contract with any

(1) 45 L. J. (M.C.) 71.

owner, occupier, or local authority for the supply of gas "in such manner and on such terms and conditions" as the parties might agree (s. 19). But by s. 21 no contract for the supply of gas was to contain "any term or condition contrary to any of the provisions" of the Act. And then came s. 39, which is word for word the same as s. 18 of the Gas Light and Coke Company's Act of 1872, except that the latter section introduces for the first time the condition about the incoming tenant continuing the trade or business of the outgoing tenant. Now, the Gas Clauses Act, 1847, the Metropolis Gas Act, 1860, and the several Acts of the Gas Light and Coke Company, by incorporation and reference, all form one code, and the expression "this Act," in s. 18 of the Act of 1872 includes them all.

The result is that, if the brewery company on taking over the premises had required a supply of gas, they and the gas company might have entered into any contract in relation to such supply not contrary to any of the terms and conditions of the code. As a condition of such supply the gas company, under the circumstances, might have required from the brewery company payment of the arrears left unpaid by the outgoing tenant. But inasmuch as the brewery company do not require the gas company to supply them with gas, s. 18 of the Act of 1872 does not apply, and the gas company are not in a position to require payment of the arrears from the brewery company.

I am, therefore, of opinion that the decision in *Gas Light and Coke Co.* v. *Mead* (1) was quite correct, and that the order of the Court of Appeal in the present case ought to be reversed with costs both here and below, and I move your Lordships accordingly.

LORD DAVEY. My Lords, I think that the decision in the case of *Gas Light and Coke Co.* v. *Mead* (1) was right, though the reasons for it are not very fully or clearly expressed in the reported judgment of the learned judges. The question turns exclusively on the proper construction to be put on s. 18 of the Gas Light and Coke Company's Act of 1872; but in order to

(1) 45 L. J. (M.C.) 71.

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understand and apply that section it is necessary to consider the law regulating the relations between the gas company and their customers at that date.

Without troubling your Lordships with going through the sections of the various Acts to which reference has been made, the situation may be summed up thus: The occupier of any premises within the district had a right to require a supply of gas to the premises, subject to his entering into a contract, if so required by the gas company, to pay gas rates for such supply for two years, and subject to his giving security, if required (see ss. 14 and 15 of the Metropolis Gas Act, 1860). The remedies of the gas company for recovery of the gas rates were by summons or action against the consumer to whom the gas had been supplied, and the company was empowered to stop the gas from entering the premises of such person by cutting off the service pipe (s. 16 of the Gasworks Clauses Act, 1847). Sect. 18 of the Gas Company's Act of 1872 deals with the case of a change in the occupation of the premises. In its original form this section is first found in the Metropolis Gas Act, 1860, s. 39 of which is identical with this section, except that the words "unless the incoming tenant shall continue the trade or business of the outgoing tenant, and shall have paid . . . . a consideration for so doing" are omitted. It reappears in the same form in the Gas Company's Act of 1870 (c. cxxi.), where it is found in a group of clauses (12 to 14) enabling the company to require a contract to be signed at any time, and to require an incoming tenant to give security, as well as the person to whom the supply was originally made, and in each of these cases the remedy of the company was to discontinue the supply of gas and remove the meter, and providing also that where the occupier is an agent or servant of some other person, such last-mentioned person shall be liable to pay gas rent to the company in the same manner and to the same extent as the occupier.

My Lords, I am of opinion that it would be contrary to sound principles of construction to imply from such negative words as you find in s. 18 of the Gas Company's Act of 1872 an affirmative enactment giving a right of action against an incoming tenant coming within the excepted description for his

predecessor's debt if some other construction can be found for the words. I am of opinion that there is another construction which does less violence to the words and is the right construction.

Vaughan Williams L.J. expressed the opinion that the learned judges would not have decided *Mead's Case* (1) as they did had they not thought that the gas company had a right to cut off the supply as against the incoming tenant till the arrears owing by the outgoing tenant were paid. If they thought so, I am not so certain as the Lord Justice is that they were wrong, for the words "premises of such person" may be construed as descriptive only of the premises in respect of which the supply of gas has been made. But it is not, in my opinion, necessary to decide this question for the purpose of construing s. 18 of the Act of 1872. I think that the words "The company shall not require from the next tenant of the premises payment of the arrears so left unpaid" are amply satisfied by referring them to the conditions of supply to the new tenant, and mean that the company shall not require payment of the arrears as a condition of continuing such supply or before entering into a contract for the same. And I construe the words at the end of the sentence, "but the company shall, notwithstanding any such arrears . . . . supply gas to the incoming tenant," as meaning a tenant within the protection of the section, or (in other words) I read the words of exception "unless, &c.," as applicable to the whole of the section. The right, therefore, from which an incoming tenant who is within one of the two excepted descriptions is excluded is that which other incoming tenants enjoy, of being entitled, notwithstanding the arrears, to a supply of gas by the company, if required by him.

This seems to me to give a harmonious, consistent, and rational construction to the whole section without doing any violence to the words or making any such implication as that of a right of action against one person for another person's debt. The construction which I have thus put on s. 18 appears to me to be favoured by the context in which the corresponding

(1) 45 L. J. (M.C.) 71.

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clause is found in the Act of 1870 in two respects. In the first place, it gives the company the same remedy against the excepted persons as they have against an incoming tenant who refuses to sign a contract, or to give security; and in the next place, in s. 14 of the Act of 1870, where it was intended to make one man liable for another's debt, it is properly done by express words.

The result is that, in my opinion, the appellant, coming within one of the excepted descriptions of incoming tenants, if he requires a supply of gas, will have to pay the outgoing tenant's arrears before he can obtain it, but if he does not require a supply he is under no liability, and cannot be sued for the arrears.

I am, therefore, of opinion that the appeal should be allowed with costs here and below.

LORD JAMES. My Lords, the correct construction to be placed upon the statute under which an obligation is sought to be cast upon the appellants presents to my mind considerable difficulty. The plaintiffs in a suit remitted for trial to the Clerkenwell County Court sought to recover a sum of 10*l.* 1*s.* 3*d.*, arrears due for gas supplied by them to one Lowless whilst lessee and occupier of some premises situated in Paddington. Those premises after the arrears had become due became vested in the appellants, who proceeded to carry on a business upon the premises. No gas was required by or supplied to the appellants. The claim of the respondent is founded upon the provisions of the Gas Light and Coke Company's Act, 1872, s. 18.

It will thus be seen that the respondents seek to make one person liable for the debt of another without the former receiving any benefit in return for discharging another's liability. It may be that the Legislature has intended that this burthen should be imposed; but before determining that such is the case distinct words of obligation free from any doubt in their construction must be found.

Upon considering the provision of the 18th section of the Act of 1872 I can find no such words. Such would be the

result upon my mind if this statute stood alone; but it has to be read by the light of previous statutes affecting the question involved. In s. 18 the words relied upon to create the appellants' liability are not positive, but of a negative character only, and although this in itself would not determine the question, yet when reference is made to s. 39 of the Act of 1860, which is the foundation of the legislation we are discussing, including the Acts of 1871 and 1872, it seems to me that the real intention of the section is not to be found in the exceptions, but in the commencement and conclusion of it.

It was also strongly urged at the bar that s. 14 of the Act of 1870 affords a good example of the direct expression of the creation of a liability, where it was intended so to do.

The conclusion I have arrived at is in accordance with the judgment in *Gas Light and Coke Co.* v. *Mead* (1), a case which appears to me to have been rightly decided.

The result is that so long as the respondents do not seek to deal with the gas company by taking a supply of gas they will not be liable for the arrears now sought to be recovered.

LORD ROBERTSON. My Lords, as is justly observed by Stirling L.J., "it is an unusual piece of legislation to make a person who has not incurred a debt liable to pay for it." The facts of the present case give peculiar point to that remark. The appellant company have no sort of relation to the respondents, have never used their gas, and want none of it. They have merely bought the business of a customer of the respondents, who left, owing them for his gas. On no doctrine or principle of law or ethics can it be suggested that apart from statutory enactment there is any obligation on the appellants to pay this account. This being so, the respondents can only succeed by shewing some positive enactment that A. shall pay B.'s debt.

Now I have never been able to see, in the section relied on, either the form or the substance of such an enactment. The main proposition of the section is negative—that is to say, it prevents the respondents doing something which it assumes

(1) 45 L. J. (M.C.) 71.

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them to have the power to do. This seems to me to furnish the key to the enactment. Before looking at the exceptions we have got to find out what it is to which they are exceptions. We have got to find out something which the respondents had, antecedently, the right to require, for it is this which (with the exceptions stated) the Act is going to prevent. Well, now, two competing theories are put forward. The one is that the word "require" means require as a condition of supplying gas. It seems to me that this is clearly the meaning of the word, at all events in the Act of 1860, in which, as s. 39, this section first appears. That Act deals with the question, What are to be the contractual relations between the gas company and its customers, and what may, and what may not, be the conditions of the contract? Among other things, the company may not require from a new occupier payment of his predecessor's arrears and so on. Now it is difficult to suppose that when this section was put into subsequent Acts it was intended to have a new and different meaning, and, in the absence of anything to the contrary, I should read it in the Acts of 1871 and 1872 just as I read it in the Act of 1860. The main proposition in the section, as ultimately framed (s. 18 of the Act of 1872), is interrupted to express the exceptions, but it is resumed in the latter part of the section. The initial and the concluding words are co-relative and co-extensive. With the exceptions stated, says the Act of 1872, the company shall not require payment of arrears, and notwithstanding non-payment gas shall be supplied.

This construction is supported when the exceptions are looked to. The main enactment being in the interests of the customer, to prevent a new occupier being coerced, by the pressure of monopoly, into a contract to pay other people's old scores, it is fair enough that this protection should not be given in the specified cases.

The competing theory, adopted by the Court of Appeal, is that the word "require" is made to extend to persons not contracting or seeking to contract with the company. Now it is quite certain that, before this clause was enacted at least, they had no right to sue the successor, and the theory, therefore,

is that the main enactment forbids the exercise of a non-existent power. Accordingly, the only operative part of the section on this theory would be the exceptions, and in the exceptions to a negative the respondents find the statutory enactment of liability for a third party's debts. This seems to me a grave infringement of principle in statutory construction, and I say so with the less hesitation, because the learned judges do not discuss this difficulty, and accordingly have done nothing to remove it.

Where a new liability is to be created, the Legislature does it by direct enactment, and Mr. Spokes pointed with great force to s. 14 of the Act of 1870 as shewing that this rule is observed in the very catena of statutes now before your Lordships, and in matter closely germane to the present question. The exception to a prohibition is primâ facie the conservation of the existing state of things. We were not referred to any illustration in legislation of pecuniary liability being imposed on a class of the community by such circuitous methods. It is in vain to appeal to solecistic or conversational slovenliness as justifying far-reaching implication in statutes imposing liability, and it is to be remembered also that this is not even a case of contract or statutory contract where individual parties are dealing with their own rights. In the present case I think the true meaning of the section is sufficiently ascertained, and presents an intelligent and coherent enactment; but even if the matter had been left more obscure than it is, I should have declined to affirm the liability of the appellants.

Order of the Court of Appeal reversed, and order of the King's Bench Division restored with costs here and below: cause remitted to King's Bench Division.

Lords' Journals, May 17, 1904.

Solicitors: *Boulton, Sons & Sandeman; Bedford, Monier-Williams & Robinson.*

[HOUSE OF LORDS.]

H. L. (E.) 1904 May 17.

SHEPHEARD AND ANOTHER . . . . APPELLANTS;

AND

BROOME . . . . . RESPONDENT.

Company—Prospectus—Omission of Contract—Untrue Statement—Fraud—"Deemed to be fraudulent"—Companies Act, 1867, *c.* 131, *s.* 38—*Directors Liability Act*, 1890, *c.* 64, *s.* 3, *sub-s.* 1.

A director of a limited company knew that a prospectus issued by the directors did not disclose a contract and a resolution of the board of directors which were in fact material but which he was advised were not, and which he honestly believed not to be material. A shareholder who had bought shares in the company having brought an action against the director for misrepresentation:—

Held, that though the director was not in fact fraudulent, he must be "deemed to be fraudulent" within s. 38 of the Companies Act, 1867, and that proof that the plaintiff took shares upon the faith of the prospectus would make the director liable both under the Act of 1867 and the Directors Liability Act, 1890, s. 3, sub-s. 1.

The decision of the Court of Appeal, *Broome* v. *Speak*, [1903] 1 Ch. 586, affirmed.

In April, 1898, the London and Northern Bank, Limited, was incorporated under the Companies Acts, Bowden being a promoter. The appellants Shepheard and Clayton and one Speak became directors. Negotiations took place for the purchase by the company of a Leeds bank, and a contract was made by letters of September 21 and October 1 for the remuneration of Bowden in connection with the purchase. At a meeting of the directors on October 10 a resolution was passed with regard to Bowden's remuneration. A prospectus was afterwards issued by the directors which did not refer to the contract for Bowden's remuneration or the resolution of October 10, and stated that certain other contracts were the only contracts to which the company was a party. The respondent bought shares on the faith of the statement in the prospectus, and, the company having gone into liquidation, he brought an action against Speak and the appellants for misrepresentation. The action was tried before Buckley J., who made an order

declaring (inter alia) that the prospectus must be deemed fraudulent within s. 38 of the Companies Act, 1867, on the part of the defendants, all of whom knowingly issued it, by reason of its not having specified the dates and names of the parties of the contract made by letters of September 21 and October 1 and the resolution of October 10; that the respondent was entitled to damages for the fraud; also to recover under the Directors Liability Act, 1890, compensation against all the defendants by reason of the untrue statement that certain other contracts were the only contracts to which the company was a party; with an inquiry as to damages. This decision was affirmed by the Court of Appeal (Collins M.R., Romer and Cozens-Hardy L.JJ.) (1) Hence this appeal by the defendants Shepheard and Clayton.

March 14, 15. *Haldane, K.C.*, and *Cassel*, for the appellants. The letters of September 21 and October 1 upon their true construction did not amount to a valid contract enforceable at law or in equity: they only bound the directors in honour. So as to the resolution. The letters had ceased to be operative, and a vague understanding to pay an indefinite sum as a matter of honour and not of legal obligation is not a contract within the meaning of the statute. Some limitation must be placed on the words of the section. It cannot be contended that every agreement whether in force or not entered into before the formation of the company should be referred to in the prospectus, especially as the Act requires only the disclosure of names and dates, not of substance and effect. Then why should no effect be given to the waiver clause? If directors in issuing a prospectus take the best legal advice available, and in fear of possible omissions frame a waiver clause, why should not shareholders be bound by what they have accepted?

The appellants did not "knowingly issue" the prospectus in any reasonable sense. In *Twycross* v. *Grant* (2) "knowingly" is defined as "intentionally," though the somewhat contradictory qualification is added that intention may be presumed though the directors thought that disclosure was not necessary.

(1) [1903] 1 Ch. 586. (2) (1877) 2 C. P. D. 469.

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The dissentient judgment of Bramwell L.J., however, interprets the words in a sense favourable to the appellants. In criminal law where the word is part of the common form it is necessary to shew a mens rea, and the word is really equivalent to "wilful." Ignorance of the law is no excuse; but in *Cooper* v. *Phibbs* (1) and *Earl Beauchamp* v. *Winn* (2) the doctrine is restricted to matters of general law, and stated to be inapplicable to a particular statute, and still more so to private contracts. The question here is really one of fact rather than of law. Some limit must be placed on s. 38: see per Thesiger L.J. in *Sullivan* v. *Mitcalfe*. (3) There is no evidence that the respondent suffered any damage, and damage is the gist of the action.

Astbury, K.C., and *Roskill, K.C.*, for the respondent. The appellants knew both the law and the facts, and the case is thus widely different from *Derry* v. *Peek*. (4) A contract was entered into on September 21, 1898, of which the appellants were aware, and it was never rescinded, although the terms were subsequently modified. That contract was certainly material; and though the later alterations may not have been legally binding, it was the appellants' duty to state the true position of affairs in the prospectus. It is not necessary to shew deceit, as in an action of deceit: all that is required is intentional concealment, whether or not the facts if disclosed would have affected the mind of an intending shareholder.

Haldane, K.C., in reply.

The House took time for consideration.

May 17. EARL OF HALSBURY L.C. My Lords, in this case I take the same view which both Buckley J. and the Court of Appeal have taken as to what the evidence proves. And to my mind it is quite immaterial to go through the whole narrative of events which have been carefully analyzed by Buckley J.

It comes practically to this—that the defendants issued a prospectus with the knowledge in their minds that certain

(1) (1867) L. R. 2 H. L. 149, 170.
(2) (1873) L. R. 6 H. L. 223, 234.
(3) (1880) 5 C. P. D. 455.
(4) (1889) 14 App. Cas. 337.

contracts had been entered into which were not referred to or stated in the prospectus. That the contract in question was immaterial I should have thought was hardly arguable, and, indeed, once the facts are understood, it is very difficult to argue "that he" (in the language of Romer L.J.) "did not appreciate the legal effect of the circumstances he knew, or did not understand that those circumstances caused such a liability to be cast upon the company as had to be set forth in the prospectus under s. 38." It is hardly necessary to add that if that is the true result of the evidence, no advice given him by any one can relieve him from the consequences of being a party to that prospectus.

I feel with Cozens-Hardy L.J. that it is a painful duty to be obliged to treat that as fraudulent which in truth was not fraudulent; but s. 38 of the Act of 1867 compels us to say that it shall be deemed to be fraudulent.

The statute, rightly or wrongly, contemplated the possibility of there being no actual fraud, and intentionally enacted that even if there were no fraud in the ordinary sense, yet if the facts established the issue of a prospectus which did not mention a contract under the circumstances contemplated by that section, and which exist in this case, such prospectus should be deemed fraudulent.

While, therefore, I quite agree with every judge who has dealt with this case, that it would be wrong to attribute fraud to Mr. Shepheard, yet I cannot doubt that his act has brought him within the section of the Act of Parliament, and, therefore, that this appeal must be dismissed. I move your Lordships accordingly.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I should have been very glad if it had been possible to relieve the appellant from the consequences of what has occurred, but I see no reason to differ from the conclusion of the Courts below. I must say I am very sorry for him.

LORD JAMES. My Lords, it is with great regret that I have also come to the conclusion that this appeal must be

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dismissed. There certainly seem to be two documents—a letter of September 21, 1898, and a resolution of October 10, 1898, which were material and important in the interests of the company and its shareholders. That the appellant knew of them is admitted, and, that being so, the Directors Liability Act, 1890, renders the director issuing a prospectus which omits to refer to such contracts liable in damages. That the appellant took the best advice he could obtain upon the disclosure that should be made in the prospectus, and has acted in perfect good faith with the fullest intention and desire to omit nothing he ought to have disclosed, does not afford any defence against an action founded upon this statute.

I think also that, a primâ facie cause of action being established, the plaintiff must be afforded an opportunity by an inquiry of shewing whether he has sustained any damage. I express no opinion whether the facts established at the hearing do or do not sustain a claim for damages.

LORD LINDLEY. My Lords, it is impossible not to sympathise with the appellant in this case, but I cannot say that the decision from which he has appealed is wrong in point of law. The Acts of Parliament which he has been held to have infringed are very stringent and are not very happily expressed. To be compelled by Act of Parliament to treat an honest man as if he were fraudulent is at all times painful; but the repugnance which is naturally felt against being compelled to do so will not justify your Lordships in refusing to hold the appellant responsible for acts for which an Act of Parliament clearly declares he is to be held liable.

He is said to have infringed two statutory enactments, namely, s. 38 of the Companies Act, 1867 (30 & 31 Vict. c. 131), and s. 3 of the Directors Liability Act, 1890 (53 & 54 Vict. c. 64). The first of these has happily been repealed; but its repeal was too late to render the Act inapplicable to this case. The appellant is alleged to have infringed these enactments by not noticing in a prospectus certain letters and resolutions of the board which ought to have been referred to in it, and especially a letter of September 21, 1898, and a

resolution of October 10 of the same year. There can, in my opinion, be no doubt that these letters and resolutions were extremely material, and ought not to have been suppressed. The appellant knew of their existence, but he honestly believed that it was unnecessary to refer to them. He took legal advice on the subject, but whether he was wrongly advised or whether he misunderstood the advice given is not clear. If the case had turned only on s. 38 of the Act of 1867, it would have become necessary to consider the effect of the waiver clause inserted, not only in the prospectus, but also in the applications for shares. But it is not necessary to decide this question, for the waiver clause has no application to the appellant's liability under the Directors Liability Act of 1890.

The prospectus unfortunately stated a fact which was not true, namely, that the only contracts to which the bank was a party were the two which were mentioned in it. This untrue statement brings the case clearly and unmistakably within s. 3, sub-s. 1, of the Directors Liability Act, 1890. It is contended for the appellant that he is not liable under this Act because he had reasonable ground to believe, and did believe, that the statement in the prospectus was true. But he knew of the documents, and he knew they were not disclosed; he thought they were not such as required disclosure. This is a question of law, and I agree with Buckley J. and the Court of Appeal that a mistake of this kind does not furnish a defence to an action founded on the statute in question. *Twycross* v. *Grant* (1) is an authority in favour of this view, although it turned on the Act of 1867.

It was then contended that there was no evidence that the plaintiff who took shares on the faith of the prospectus had sustained any damage by reason of the untrue statement contained in it. The company failed about a year after it was formed, and the plaintiff has lost the money he paid for his shares. This appears to me to be sufficient primâ facie evidence of some damage sustained by the plaintiff by reason of the untrue statements in question. All that has been done

(1) 2 C. P. D. 469.

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by the Court as yet has been to decide that the plaintiff has proved enough to entitle him to an inquiry as to the amount of damages which he has sustained by reason of such statements. This is quite in accordance with the usual practice in actions of this kind when brought in the Chancery Division, and it is extremely convenient. It saves the trouble and expense of going into evidence which will be useless if the plaintiff fails to establish any liability of the defendant to him.

The appeal ought to be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 17, 1904.

Solicitors: *Waterhouse & Co.; Rowcliffes, Rawle & Co., for Cooper & Son, Manchester.*

[HOUSE OF LORDS.]

THE MIDLAND RAILWAY COMPANY . APPELLANTS; H. L. (E.) 1904 May 17.

AND

MARY SHARPE. . . . . RESPONDENT.

Employer and Workman — Compensation — Earnings — Lodging Allowances — Railway Guard — Workmen's Compensation Act, 1897 (*c.* 37), 1*st Schedule*, (*a*), (*i*).

A railway guard was paid in addition to his wages a fixed sum whenever his duties required him to lodge away from home. No inquiry was made whether he spent that sum or any sum :—

Held, that these fixed sums were part of his "earnings" within the meaning of the Workmen's Compensation Act, 1897, 1st schedule.

The decision of the Court of Appeal, [1903] 2 K. B. 26, affirmed.

GEORGE SHARPE, the respondent's husband, was employed as a railway guard by the appellants. In addition to his wages he received a fixed sum whenever his duties as guard required him to lodge away from home. The terms on which the sums were paid are stated in Lord Davey's judgment. Sharpe having been killed by an injury received during his employment, the question in an arbitration under the Workmen's Compensation Act, 1897, was whether these fixed sums allowed for lodgings were part of his "earnings" within the meaning of the 1st schedule to that Act. The county court judge (Lindley) held that they were, and awarded accordingly. This decision was affirmed by the Court of Appeal (Collins M.R., Stirling and Mathew L.JJ.) (1) Hence this appeal.

Cripps, K.C., and *Hugo Young, K.C.* (*John D. Crawford* with them), for the appellants. "Earnings" in the Act means fixed sums for fixed and definite work, and does not include casual and indefinite moneys paid for special extra duties. This was the principle adopted by this House in *Upperton* v. *Ridley* (2) as to the word "pay." "Earnings" necessarily implies "profits," and there is no evidence that the deceased made any profits out of these allowances. To come within

(1) [1903] 2 K. B. 26. (2) [1901] A. C. 281.

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the Act it must be shewn that the deceased's dependants were dependent on these sums, and there is no evidence that they were. The natural inference is that they were not, since the deceased was then away from home. *Abram Coal Co.* v. *Southern* (1) and *Houghton's Case* (2), before the Court of Appeal, are essentially different.

S. T. Evans, K.C., and *Clement Edwards*, for the respondent, were not heard.

LORD DAVEY. The question is a short and simple one. By the Workmen's Compensation Act, 1897, 1st schedule, if a death results from injury, "the amount of the compensation under this Act shall be, if the workman leaves any dependants wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury." The question is what were the deceased's "earnings" at the time of his death. He was in the employment of the Midland Railway Company as a goods guard, and, as your Lordships may easily understand, a person in that kind of employment has sometimes to sleep away from his ordinary residence or to take his meals away from his home. Accordingly, an arrangement is made by the Midland Railway Company for the remuneration of their guards having regard to that fact. They have a scale which is before your Lordships, and by that scale the wages are of a certain amount varying with the time during which the guards have been in the company's service. Sixty hours constitutes a week's work, and then there is a heading called "Lodging allowance," and under that heading we find these allowances: "When men are required to lodge away from home they are allowed one shilling per night in the provinces and one shilling and sixpence in London if the company's lodging-house is used. Three shillings in London and two shillings elsewhere for private lodgings. In the exceptionally long periods of rest for the company's convenience, where men have to lodge for over thirteen hours an extra shilling is allowed, and two shillings

(1) [1903] A. C. 306. (2) [1901] 1 K. B. 93.

where over twenty hours' rest has to be taken—except in London, where the extra allowances are one shilling and one shilling and sixpence respectively. This extra allowance is not given unless the time occupied on the outward and return journeys together equals twenty hours."

The question is whether the allowances which were thus made form an element in arriving at the amount of the earnings of the deceased guard, or, in other words, whether the earnings are to be merely the fixed wage which he received, without taking into account these extra allowances. The evidence before the learned county court judge shewed that those allowances are carefully adjusted and arrived at so that not much profit is to be made out of them, but it is, of course, perfectly conceivable that if a man had, for instance, a relative or a friend living in one of the places away from his home where he had to pass the night, he might very easily make a profit out of the allowance. The guards are not bound to account to the company for the allowance, and whether their actual expenditure is less or more, their allowance remains exactly the same.

Now what does a man earn? He earns the sum which is the fruit of his labour; whatever he receives by way of remuneration for the services he gives, or, as Lord Macnaghten said in *Abram Coal Co.* v. *Southern* (1), a man's "earnings" are "the full sum for which the man is engaged to work." Does it make any difference, that from the conditions of the employment, part of the remuneration that he receives without accounting for the use of it is in consideration of peculiar conditions affecting his employment? I think not. For instance, if the wages were 3*s.* a day, and the company, instead of making a time allowance, gave a fixed addition to the wages, and said, "We will give 24*s.* and no time allowances," I think nobody could doubt that in that case the earnings would be the 24*s.* a week; and none the less so because the conditions of the employment were such that the workman had to incur some expenses in order to enable him to perform the services for which he was to be remunerated.

(1) [1903] A. C. 306.

H. L. (E.) 1904 MIDLAND RAILWAY v. SHARPE. Lord Davey.

The converse case which was before your Lordships in *Abram Coal Co.* v. *Southern* (1), and before the Court of Appeal in the *Houghton Case* (2), is very illustrative. In that case, like the present, the workman had to incur certain expenses, of which I will take lamp oil as one, for the purpose of earning his stipulated remuneration. The company, his employers, were willing to supply him with lamp oil, making a deduction from his wages in respect of it. Well, my Lords, if the defendants were right, that you are to look, not at the wages, but at the amount of profit which the man makes out of his wages, as the test of the amount of compensation under this Act, one would have thought that those deductions, being deductions from his wages for the purpose of enabling him to earn his wages, ought not to be taken into account as against the company for the purpose of ascertaining that compensation. But the contrary was the decision. It was held that what you must look at was the actual amount of the man's remuneration for his services, and that you could not take into account the expenses he had to incur for the purpose of putting himself into a condition to earn that remuneration.

I think the only difficulty in this case is the fact that the company, instead of making a fixed addition to the wages to cover those casual and incidental expenses to which guards may be put, give an allowance varying according to the time during which the man is obliged to be away from home at rest; but that does not seem to me to make the least difference in principle. If a man's wages have a fluctuating character based upon the time, not merely during which he is actually employed, but including also the time during which he is at rest, as is the fact in this case, it does not seem to me to make the slightest difference in principle. If the appellants are right, you would in every case have to analyze the remuneration by way of wages or salary which has been paid to an injured or deceased employee, and to ascertain the conditions of his labour, and what expenses he was put to, or might be put to, in order to earn that remuneration. It would be impossible to analyze that in every case, and I think that cannot have been

(1) [1903] A. C. 306. (2) [1901] 1 K. B. 93.

within the contemplation of the Legislature in framing the Act. You must take for the purpose of assessing the compensation the actual remuneration for his services which was received by the workman, quite irrespective of the question of what expenses he was put to for the purpose of earning that remuneration.

I therefore move your Lordships that the present appeal be dismissed with costs.

LORD JAMES. My Lords, I entertain no doubt in this case. I am clearly of opinion that the judgment of the Court of Appeal is correct.

The question before your Lordships is the construction that is to be put upon the word "earnings" in the schedule of the Workmen's Compensation Act, 1897. The meaning of that word appears to me to be the amount received by the workman on account of, and in return for, his services. Now, my Lords, in this case we must ask, What did the allowances received by the deceased workman represent? They appear to me to represent a return for the services which he rendered; and if we were to go beyond the question of what was the amount he received in return for those services, your Lordships would be making the mistake of inquiring as to profits instead of inquiring as to receipts.

My Lords, in the argument at the bar the illustration was put before your Lordships of a case where a man received a certain sum of money for a specific object, to which he was bound to apply it, and if he did not so apply it he would have been guilty of a breach of trust, and would probably have committed the crime of embezzlement; but, my Lords, that is not the case here. The deceased workman and the other workmen are paid a certain sum of money weekly—a smaller sum if they remain within the neighbourhood of their own homes, a larger sum if they are absent from those homes. In both cases the sums paid are wages; in both cases the workman is entitled to make as much profit as he can out of the sum so received, to be as abstemious as he will, to receive, as it has been said, hospitality, and to obtain the advantages which a man who

H. L. (E.) 1904 MIDLAND RAILWAY v. SHARPE. Lord James.

chooses not to afford himself comforts beyond the necessaries of life obtains over his fellow-workman who is more luxurious in his habits. I cannot understand how it can be said that that is not an "earning." One could give many instances. For example, if a workman were told, "You will receive so much wages if you are in uniform, and you will have to find your own uniform," then it is a gross sum that he receives; the application of a certain part of it to a particular output, namely, the payment for the uniform, does not render the money which he receives any the less "earnings." So in the same way here. If the man is told by the railway company, "You will receive, if you are away from home, so much, and having received it, do what you will with it; we, the railway company, do not ask you to account for it." It seems to me to be quite clear that the sum so received is an "earning," although, no doubt, at the time when the sum was fixed, the object of fixing the higher rate was to meet a corresponding expense. That is not the question: the question is "earnings" as against "profits"; and, looking at the application of that word in this case, it seems to me, my Lords, as I have said, quite clear that the judgment of the Court of Appeal is correct.

LORD ROBERTSON. My Lords, the contract with this guard is that, plus what is called his wages, he is entitled to so much for each night he is away from home; and no inquiry is made whether that sum has been spent on board and lodging, or spent at all. This being so, it seems to me that, not the less because the purpose of these extra payments was to meet the cost of board and lodging has this man a right to the money, and not the less because they bear the name "allowances' does the guard earn them each time he, on the service of his employers, has to spend the night away from home. And if he earns them they are "earnings."

Order of Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 17, 1904.

Solicitors: *Beale & Co.; Arthur Toovey, for Flint & Sons, Derby.*

[HOUSE OF LORDS.]

ILLINGWORTH . . . . . APPELLANT;

AND

HOULDSWORTH AND ANOTHER . . . RESPONDENTS.

H. L. (E.) 1904 July 1.

Company — Mortgage — Assignment of Present and Future Book Debts— Registration of Mortgage—Companies Act, 1900 (*c.* 48), *s.* 14, *sub-s.* 1 (*d*).

A company, by way of security to guarantors, assigned by deed all its present and future book and other debts, with the benefit of all securities for the same, to a trustee in trust for the guarantors. The deed contained no express provision against possession being taken by the trustee, but declared that the trustee should at any time, if required by the guarantors, give notice of this assignment to the company's debtors, but that it should not be incumbent on the trustee to give notice unless he thought fit; with provisions that the trustee might at any time give notice, appoint a receiver and exercise the statutory power of sale, but meanwhile should not be answerable for allowing the company to receive the book debts :—

Held, that upon the true construction of the deed it was clearly intended that the company should carry on its business in the ordinary way and receive the book debts for that purpose, and that the deed was "a floating charge" within the meaning of s. 14 of the Companies Act, 1900, and void for want of registration in a question between the trustee and a creditor of the company.

The decision of the Court of Appeal, *Houldsworth* v. *Yorkshire Woolcombers Association*, [1903] 2 Ch. 284, affirmed.

By a trust deed of 1900 the Yorkshire Woolcombers Association specifically mortgaged its freeholds and leaseholds to secure its debenture stock, and charged in favour of the trustees, by way of floating security, all its other property and assets both present and future and its undertaking, but not its uncalled capital. Clause 21 contained a power allowing the association (until the trust to enter, sell, &c., should be exercisable) to sell, specifically mortgage, or otherwise deal with the property and assets by way of floating security.

Guarantees having been given to the bankers of the association to secure a large overdraft, by a mortgage of

H. L. (E.) 1904 ILLINGWORTH v. HOULDSWORTH.

October 25, 1902, after reciting the overdraft, and that the association would from time to time require advances from the bank; that the guarantors had requested the association to discharge them from their liability, but had agreed not to take any immediate steps to obtain their discharge on having the indemnity and specific security thereinafter appearing, the association covenanted to indemnify the guarantors by assigning to the appellant all the book and other debts now owing, or which might at any time during the continuance of the security become due and owing to the association, and the full benefit of all the securities for the present and future book and other debts, in trust for the guarantors in proportion to their respective liabilities, subject to redemption. The mortgage also contained a clause as to taking possession which is fully set out in the report below, and the effect of which is stated in the head-note of this appeal.

On November 21, 1902, the appellant appointed a receiver of the book and other debts, and gave notice to the debtors of the mortgage and the appointment.

On November 25 a receiver was appointed by the Court in an action brought by the respondents as trustees under the deed of 1900 against the association to enforce the security created by that deed.

The appellant having applied for an order (inter alia) giving him liberty to collect the book debts, Farwell J. refused the application, being of opinion (1.) that the mortgage of book debts in the deed of October 25, 1902, was not a specific mortgage or charge within the meaning of clause 21 of the trust deed of 1900; and (2.) that it was a floating charge on property of the company within the meaning of s. 14 of the Companies Act, 1900; and this decision was affirmed by the Court of Appeal (Vaughan Williams, Romer, and Cozens-Hardy L.JJ.) (1)

Hence this appeal.

Neville, K.C., and *E. P. Hewitt*, for the appellant. The mortgage of 1902 is a specific assignment of a definite por-

(1) [1903] 2 Ch. 284.

tion of the assets. It is not a charge upon the undertaking or upon the whole of the property, and is therefore not a floating charge within s. 14 of the Companies Act, 1900. It is a specific charge on the book debts, and is a valid and specific charge on a particular and properly defined portion of the assets, and so has priority over the debenture trust deed.

[They cited *Tailby* v. *Official Receiver* (1); *Governments Stock and other Securities Investment Co.* v. *Manila Ry. Co.* (2)]

Upjohn, K.C., and *A. H. Montgomery*, for the respondents, were not heard.

EARL OF HALSBURY L.C. My Lords, it does not appear to me that this case is susceptible of much discussion, nor do I think it necessary to give an abstract definition of what a floating security is; it is enough to say that this instrument is one, and I think it is one for many reasons. In the first place you have that which in a sense I suppose must be an element in the definition of a floating security, that it is something which is to float, not to be put into immediate operation, but such that the company is to be allowed to carry on its business. It contemplates not only that it should carry with it the book debts which were then existing, but it contemplates also the possibility of those book debts being extinguished by payment to the company, and that other book debts should come in and take the place of those that had disappeared. That, my Lords, seems to me to be an essential characteristic of what is properly called a floating security. The recitals, I agree with Cozens-Hardy L.J., are not without their importance. They shew an intention on the part of both parties that the business of the company shall continue to be carried on in the ordinary way—that the book debts shall be at the command of, and for the purpose of being used by, the company. Of course, if there was an absolute assignment of them which fixed the property in them, the company would have no right to touch them at all. The minute after the

(1) (1888) 13 App. Cas. 523, 541. (2) [1897] A. C. 81.

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execution of such an assignment they would have no more interest in them, and would not be allowed to touch them, whereas as a matter of fact it seems to me that the whole purport of this instrument is to enable the company to carry on its business in the ordinary way, to receive the book debts that were due to them, to incur new debts, and to carry on their business exactly as if this deed had not been executed at all. That is what we mean by a floating security.

It appears to me, notwithstanding the argument we have heard, that it is impossible to doubt that the bargain between the parties which is evidenced by this instrument is one which could only be carried out at all by its being a floating security such as I have indicated, and which must comprehend those incidents.

I am not able to deduce more from the instrument itself than the Court of Appeal have done, and I entirely agree with the judgment pronounced by them, and it appears to me that this appeal ought to be dismissed.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I think the judgment of Farwell J., affirmed by the Court of Appeal, is perfectly correct.

With regard to the criticism which Vaughan Williams L.J. passed, not I think unkindly, on some words of mine in the *Manila Case* (1), I only wish to observe that what I said was intended as a description, not as a definition, of a floating security. I should have thought there was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so, to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.

(1) [1897] A. C. 81.

I agree that this is a clear case, and that the appeal should be dismissed with costs.

LORD JAMES. My Lords, I concur.

LORD LINDLEY. So do I.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 1, 1904.

Solicitors: *Leslie Hardy, for Frank Taylor, Bradford; George Trenam, for Addleshaw, Warburton & Co., Manchester.*

[HOUSE OF LORDS.]

ROBINSON GOLD MINING COMPANY AND OTHERS . . . . . } APPELLANTS;

AND

ALLIANCE INSURANCE COMPANY RESPONDENTS.

Insurance (Marine)—Policy—Property of Alien Enemy—Loss before Commencement of War—Seizure by Enemy's Government of Property of its own Subject in anticipation of War—Warranty free of Capture, Seizure, and Detention.

Gold, the property of a company registered under the laws of the South African Republic, was insured against "arrests, restraints, and detainments of all kings, princes, and people" during transit from the mines to the United Kingdom, subject to a warranty "free of capture, seizure, and detention, whether before or after declaration of war." During transit the gold was taken possession of by the Government of the Republic on its own territory in anticipation of war with Great Britain, and in accordance with the laws of the Republic, and was afterwards appropriated by the Government:—

Held, that there was a "seizure" of the gold within the meaning of the warranty, and that the insurers were not liable on the policy.

The decision of the Court of Appeal, [1902] 2 K. B. 489, affirmed.

IN October, 1899, gold of the value of 211,000*l.* belonging to the appellants was sent by rail from Johannesburg to

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Cape Town en route for London, and was removed from the train in the territory of the South African Republic by a Government official who had received a telegram from the State Attorney, Pretoria, ordering him to take the gold into safe custody. The Government of the Republic was in this matter (as found by Phillimore J.) acting according to the laws of the Republic and exercising a constitutional right to commandeer the property of subjects of the Republic in view of the impending war, which broke out a few days after.

The gold had been insured during its transit from the mines to Johannesburg and Cape Town and thence by steamer to the United Kingdom against (inter alia) "arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever." The policy contained this clause: "Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war."

The appellants having brought an action on the policy against the insurers, Phillimore J. gave judgment for the respondents (1), and this decision was affirmed by the Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ.). (2)

July 5, 7. *Lawson Walton, K.C.*, and *J. A. Hamilton, K.C.* (*Bigham* with them), for the appellants. The loss came within the words "arrests, restraints, and detainments." Those words are certainly larger, and include more events than the warranty against "capture, seizure, and detention." Otherwise it would be idle to insert the words "arrests," &c. "Capture" means taking by a belligerent alien. "Seizure" must be construed as ejusdem generis with "capture," and implies violence—force. There must be an element of physical force in the taking, either in vindication of the law, or for the punishment of an illegal act, or mere wrongful force. "Seizure" in this warranty (which is more than 100 years old) has never been applied to the mere peaceful giving up by the

(1) [1901] 2 K. B. 919. (2) [1902] 2 K. B. 489.

owner in response to a lawful demand by the Government whose subject he is. Here there was no violence or force, nothing but the uncontested demand of possession "for safe custody." No doubt the gold was afterwards appropriated by the Boer Government for its own purposes including the prosecution of the war, but that could not turn the original peaceable taking into a seizure. It will not be contended that the case comes within the expression "hostilities, or warlike operations."

[They cited *Janson* v. *Driefontein Consolidated Mines, Ld.* (1); *Kleinwort* v. *Shepard* (2); *Cory* v. *Burr* (3); *Miller* v. *Law Accident Insurance Co.* (4), and the cases there cited; also 2 Arnould on Marine Insurance, 7th ed. p. 939, s. 829; 1 Parsons on Marine Insurance, 577; Phillips on Insurance, ss. 1108–1111.]

Lord Robert Cecil, K.C., Scrutton, K.C., and *Theobald Mathew*, for the respondents, were not heard.

EARL OF HALSBURY L.C. My Lords, I cannot help thinking that if this had been a question of some trifling contract that we were construing, not involving a very enormous sum of gold, it would not have occupied a day and a half to argue it; nor do I think that the distinction which has been urged from time to time on the words of the warranty would have been so insisted upon. I confess I cannot entertain the least doubt in the world that the language here is used in its plain and natural sense, and if it is construed in its plain and natural sense I think the judgment of the Court of Appeal is absolutely right.

What can be the value of an argument upon some technicality or some narrow construction of the whole contract between the parties where the truth is that the word "seizure" is intended to be used in a general sense? This gold was seized, taken away, and ultimately used by the Government of the South African Republic. It was taken—I do not care whether they had authority according to their law or not—as a matter of fact it was taken, and that was one of the things excluded from the

(1) [1902] A. C. 484.
(2) (1859) 1 E. & E. 447.
(3) (1883) 8 App. Cas. 393.
(4) [1903] 1 K. B. 712.

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losses insured against. The bargain between the parties put in plain terms is: "I, the underwriter, will not be responsible if this gold is taken away and seized by any authority whatsoever." That is the plain meaning of the bargain. Why am I to put any technical or narrow construction upon those words? That is the bargain which the parties have agreed to. I decline to go into the ingenious argument which has raised every kind of supposed distinction that could apply to such a case when to my mind these words are absolutely plain. The words seem to me to take out of the perils insured against the particular thing that has happened. I decline to go into it further than this—that this gold was seized.

Subtle distinctions have been raised by Mr. Hamilton, but it seems to me that he wants to divide a plain transaction into two different sets of proceedings, so that the first stoppage, detention, or seizure (whatever word is used) was not intended to be an absolute seizure, but only to keep the gold in safe custody. I think the Transvaal Government intended to appropriate the gold from the first; but whether that was their intention or not they seized it, and took care that it should be within their power and control if they thought proper to use it.

Under these circumstances it seems to me that the terms of the warranty clearly apply; and that being so, I decline to go into this very long series of authorities or into those ingenious subtleties which have been put before us.

My Lords, it appears to me to be a very plain case, and I move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I do not think the question which has been argued is really arguable.

If this is not "seizure" within the meaning of the warranty in the policy, and indeed in every possible sense of which the word is capable, I really do not know what "seizure" is. The view of the appellants, if I rightly apprehend their argument, seems to be that what happened just fell short of a voluntary offering (a condition of things which would have been fatal to their claim), because there was, or ought to have been, a

recognition of legal obligation—that so it just lacked the grace of a freewill contribution by patriotic citizens to the pressing needs of the country, but that there was no sense or consciousness of force present to the minds of the owners of the gold which is alleged to have been seized or the minds of those in whose hands it was at the time. Nothing to my mind could be a greater travesty of the real facts of the case. The gold was not given up by the owners or by persons authorized by the owners to give it up. It was taken with a high hand from the carriers to whom it had been entrusted for safe carriage and diverted from the course which it was intended to pursue. That, in my opinion, was seizure in its plainest form.

LORD JAMES. My Lords, I am of the same opinion. It seems to me to be clear upon the question of fact that the orders given by the Transvaal Government on October 2 when carried out amounted to seizure, and therefore came within the warranty.

LORD LINDLEY. My Lords, I am of the same opinion, and I cannot usefully add anything. It appears to me to be quite a plain case.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 7, 1904.

Solicitors: *Ingle, Holmes, Sons & Pott; Waltons, Johnson, Bubb & Whatton.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1904 *May* 17.

PARKER AND OTHERS . . . . . APPELLANTS;

AND

THE LORD ADVOCATE (ON BEHALF OF HIS MAJESTY) . . . . . RESPONDENT.

Scottish Law—Fishings—Mussel Fishings—Crown Rights.

Mussel scalps on the foreshore or the estuary of a navigable river form part of the patrimonial property of the Crown which it can convey or let in lease to a subject.

APPEAL from the First Division of the Court of Session, Scotland. (1)

The appellants were Maurice Parker, mussel merchant, Greenock, and two other persons described as mussel fishermen, and the respondent was the Lord Advocate. The question in the appeal was whether the sole and exclusive property in and right to the mussel beds, scalps, and fisheries upon a defined piece of ground, part of the foreshore and bed of the river Clyde, belong to and were vested in the Crown. The appellants asserted right to fish for mussels within the defined area as members of the public, whereas the respondent maintained that the mussel beds in question and the right of fishing for mussels belonged to the Crown. The mussel fishing in question was one of the many valuable mussel fisheries in Scotland, and the respondent alleged that it was essential in the interest of the line fishermen that the mussel beds should be protected from indiscriminate fishing on the part of the public, who for many years past took the mussels off the beds with iron-toothed rakes, exercising no care in selecting any mussels of a proper size, the result being that young mussels had not been given time to grow and breed, and the beds had been ruined.

In 1897 the question was taken up by the Fishing Board

(1) (1902) 4 F. 698.

for Scotland, constituted by the Sea Fisheries Regulation (Scotland) Act, 1895 (58 & 59 Vict. c. 42), and a lease of the mussel beds from the Crown to them was executed, and with the consent of the Board of Trade a sub-lease was granted by the Board to John Hamilton Fullarton, D.Sc. In the same year a notice was posted by order of the Board on the quays of Port Glasgow to the effect that thereafter the fishing for or removal of mussels from the area of the foreshore and bed of the Clyde described in the notice, except with the written permission of the Fishing Board for Scotland, was strictly prohibited. Notwithstanding these notices certain persons, claiming right as members of the public, continued to take mussels indiscriminately, and a prosecution against two fishermen for contravening s. 1 of the Mussel Fisheries (Scotland) Act, 1847, was commenced in the Sheriff Court, but the Sheriff-Substitute dismissed the action on the ground that the case was unsuited for a summary criminal prosecution in view of the important question of law involved as to the ownership of the mussel beds.

To determine the question the respondent raised an action against the appellants and others of declarator and interdict, asking for a declaration that the sole and exclusive property in and right to the whole mussel beds, scalps, or fisheries upon or within that area or piece of land being part of the foreshore and bed of the river Clyde below high-water mark, as delineated on a plan produced, belonged to and were vested in the Crown, and that the sole and exclusive privilege of dredging, fishing for, gathering, and taking and carrying away mussels from the said mussel beds belonged to and was vested in the Crown. Interdict against the appellants and others was also asked. A decree in absence was obtained on February 20, 1900. In 1901 the appellants, defenders in the previous action, raised this action against the respondent as representing His Majesty, the Commissioners of His Majesty's Woods, Forests, and Lands, and also the Board of Trade, concluding for reduction of the decree in absence. The appellants stated that from time immemorial and at least for several hundred years the people of Scotland had exercised the right of fishing for and

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taking away, and had freely fished for and taken away, without let or hindrance on the part of either the Crown or of any subject, both floating fish (other than salmon) and shell fish, including mussels, from the arms of the sea, estuaries, and navigable tidal rivers in Scotland, and from the foreshore thereof, unless in areas to which subjects had lawfully acquired private rights of property; and that prior to the granting of the decree under reduction no exclusive right to mussel fishings in deep water below low-water mark had ever been recognised as belonging either to the Crown or to any subject.

On November 27, 1901, the Lord Ordinary (Lord Kincairney) gave judgment for the Crown. (1)

On March 18, 1902, the First Division adhered to the Lord Ordinary's interlocutor. (2)

Feb. 29; March 1. *Haldane, K.C.*, and *H. P. Macmillan* (of the Scottish Bar), (with them *Gerard Sanders*), for the appellants. The question is whether mussel fishings are in the private or public property of the Crown. The Crown says this piece of ground is like other parts of Scotland, and that the public were in use to take mussels, but always with the licence or permission of the Crown, it being part of the Crown's patrimony. It is no longer competent for the Crown to make grants of mussel fishings in Scotland in favour of subjects, because the reason for such grants is no longer tenable, namely, the protection of the mussel beds from depletion in view of modern legislative protection; and, secondly, Magna Charta put a limitation on the Crown's prerogative in England, and by force of the Act of Union the Royal perogative is subject to the same limitation in Scotland as it undoubtedly is in England. Fishings in the territorial waters of Scotland have always been recognised as public, with the exception of salmon fishings. All other sea fishings are public. If they are vested in the Crown they are vested for the public benefit. The law of England equally recognises the right of the public to sea fishings. Thus in England shell fishings have been uniformly treated as in exactly the same position as all other sea fishings:

(1) See end of Case, p. 369. (2) See end of Case, p. 373.

Bagott v. *Orr* (1); *Richardson* v. *Mayor of Orford* (2); *Malcomson* v. *O'Dea* (3); *Crichton* v. *Collery* (4); *Goodman* v. *Mayor of Saltash* (5); *Neill* v. *Duke of Devonshire* (6); *Truro Corporation* v. *Rowe*. (7) In Scotland the law is the same: Balfour's Practicks, 626; *Grant* v. *Ross* (8); *Hall* v. *Whillis* (9); *Duke of Argyll* v. *Robertson* (10); Bell's Prin. § 646; *Gilbertson* v. *Mackenzie* (11); *Nicol* v. *Lord Advocate*. (12)

The result of these cases is that the law recognised in 1859 a common law right in the public to take mussels and mussel scalps on the foreshore and in the sea, except where the public were excluded by a grant in favour of a private person. We now come to cases relied on by the respondent: *Lindsay* v. *Robertson* (13) and *Duchess of Sutherland* v. *Watson*. (14) It is to be noted that these cases were not between the Crown and the public, but between the public and a barony proprietor. The main decision in the *Sutherland Case* (14) was that a mussel is not a fish at all, but a part of the solum, which is quite contrary to the *Saltash Case*. (5) The cases of *Lindsay* (13) and the *Duchess of Sutherland* (14) presents no obstacle to the appellants' case; on the other hand, the legislative treatment of mussels is in favour of the appellants. The Mussel Fisheries (Scotland) Act, 1847 (10 & 11 Vict. c. 92), preamble and s. 1, makes it a theft to take mussels. This obviously means from private mussel beds; and the terms of the Act are inconsistent with the view that mussels are partes soli. Mussels are animals feræ naturæ, and taking them from private beds could not constitute a theft unless specially made so by statute.

[They also commented on the Sea Fisheries Act, 1868

(1) (1801) 2 B. & P. 472; 5 R. R. 668.
(2) (1793) 1 Anstr. 231; 3 R. R. 579.
(3) (1863) 10 H. L. C. 593.
(4) (1870) 19 W. R. 107.
(5) (1882) 7 App. Cas. 633.
(6) (1882) 8 App. Cas. 135.
(7) [1901] 2 K. B. 870; [1902] 2 K. B. 709.
(8) (1764) Mor. Dict. 12801; aff. H. L. (1769) 6 Pat. App. 779.
(9) (1852) 14 D. 324.
(10) (1859) 22 D. 261.
(11) (1878) 5 R. 610, 620.
(12) (1868) 6 M. 972.
(13) (1867) 5 M. 864; (1868) 6 M. 889; 7 M. 239.
(14) (1868) 6 M. 199.

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(31 & 32 Vict. c. 45), ss. 28, 46, 51; the Sea Fisheries Act, 1894 (57 & 58 Vict. c. 26), s. 1, sub-s. 2; the Sea Fisheries Scotland) Act, 1895 (58 & 59 Vict. c. 42), s. 8, sub-s. 2.]

Scott Dickson, L.A., and *Dundas, S.-G. for Scotland* (with them *Vaughan Hawkins* and *J. C. Pitman*), (all of the Scottish Bar except the third), for the respondent. A mussel fishing is a heritable right, and to found prescription a written title must be produced. Mussels are different from salmon and floating fish; they are fixed to the soil for at least ten years, and have to be removed with a strong iron rake. In the leading case of the *Duchess of Sutherland* (1) every case and text writer was quoted, and that case decided that mussel fishings were vested in the Crown, not as trustee for the public, but as a private heritable right. To the same effect was *Lindsay* v. *Robertson*. (2) As to the Crown's right to the solum of the foreshore: *Lord Advocate* v. *Clyde Navigation Trustees*. (3)

There is no doubt that an artificial crop of mussels would not be pars soli; but natural-grown mussels would be. As to the statutes quoted by the appellants, they distinctly recognised the rights of private and Crown property in mussel scalps. It is the law of Scotland only that is to be applied in this case.

Haldane, K.C., in reply.

The House took time for consideration.

May 17. EARL OF HALSBURY L.C. My Lords, in this case I think the judgments of the Lord President and the Lord Ordinary are complete and exhaustive, and I do not wish to add a single word to them. (4) The Lord President has, I think, with great precision, traced the origin and the application of the Crown rights, and I do not think there is any difference in the law applicable to those Crown rights between the law of England and the law of Scotland. I am therefore of opinion that the judgment of the Lord President and his colleagues should be affirmed, and this appeal dismissed with costs.

(1) 6 M. 199.
(2) 5 M. 864; 6 M. 889; 7 M. 239.
(3) (1891) 19 R. 174.
(4) See below, p. 369.

LORD MACNAGHTEN. My Lords, I am of the same opinion. The judgment of the Lord President is so clear and complete that I do not desire to add a word to it.

LORD DAVEY. My Lords, I concur.

I have carefully considered the judgments delivered by Lord Kincairney in the Outer House, and by the Lord President with the concurrence of his colleague in the Inner House, and the decisions which are therein referred to; and I think that the opinion unanimously expressed by those learned judges is amply borne out by the authorities quoted by them. Whatever doubts may have been entertained or different opinions expressed in former times, it must now be taken to be established by a series of authorities extending from at least the beginning of the last century that mussel scalps and mussel fishings may be a competent subject of grant by the Crown. I do not think that the attempt made by the appellants to explain the grants of mussel fishings by attributing them to the exercise of the prerogative of the Crown over property held in trust for the public in supposed analogy to English law can be maintained; and I think that the better opinion is that which I consider to be now established law in Scotland, namely, that mussel fishings are part of the heritable patrimonial property of the Crown. I cannot add anything to the reasons for their judgment expressed by the learned judges.

LORD ROBERTSON. My Lords, I entirely agree in the judgment of the Lord President, and in the appreciation of that judgment expressed by my noble and learned friend on the Woolsack.

Ordered that the appeal be dismissed with costs.

Lords' Journals, May 17, 1904.

JUDGMENTS IN THE COURT OF SESSION.

1901. Nov. 27. THE LORD ORDINARY (LORD KINCAIRNEY), after stating the facts, said:—Rights to mussel fishings are to be carefully distinguished from various cognate rights, such as rights to salmon fishings from which they are widely

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apart, rights to fishings of white and floating fish, rights to lobster fishings, and rights to take limpets, whelks, and other bait, from all of which rights to take mussels are to be distinguished, because of the different habits and uses of the different animals, and on that account questions as to rights to mussels and to oysters have been assimilated. Decisions, therefore, as to other kinds of fishings are not directly or immediately applicable.

It is, I think, settled law, and has been so considered for a long period, that a Crown grant of mussel fishings may confer an exclusive right on the grantee. This is a point on which there seems to be now a consensus of judicial opinion. It does not agree with, but must be held, I think, to modify, the law stated in Balfour's Practicks, 626, which is the starting-point of the argument against the Crown, and for the public; and it is probably not quite consistent with the law as stated in Hale on the Foreshore (Moore's History of the Foreshore, 377, 387), or it may be in Stair, II. 3, 69; yet in *Ramsay* v. *Kellies*, 5 Bro. Supp. to Mor. Dict. 445, so early as 1776, it is stated that many such grants were known to exist and to be recognised; and in the case of *Duke of Portland* v. *Gray*, (1832) 11 S. 14, Lord Corehouse laid it down as then settled law that "a right to fish for oysters and mussels in the sea from the scalp or bed to which they are attached may be appropriated," and I do not know that this dictum has ever been seriously questioned. It is perhaps worth while to notice that this case appears to have been very elaborately argued, if one may judge from the list of authorities cited; and Lord Corehouse's statement of the law must be held to be the result of his consideration of these authorities.

I do not think it necessary to quote other authorities on this point. The law is thus summed up in Bell's Principles, § 646: "An exclusive right to take oysters, mussels, &c., which are affixed to the spot is effectual within the three-mile limit where expressly granted." The point was hardly taken, or at least not confidently maintained, by the pursuers.

It appears to me that the law as thus settled imports a modification of the earlier law; and that the reason for it appears in the judgment in the important case of *Grant* v. *Ross*, (1764) Mor. Dict. 12801, which was affirmed on appeal. The report bears that in a public river a mussel scalp belongs, like white fish, to the public, and, consequently, the use of it is open to every one of the lieges. But as such general use tends to root out every mussel scalp, expediency supported by practice has introduced a prerogative in the Crown of gifting mussel scalps to individuals, "which has the effect to preserve them by the exclusive use given to the grantees." By the judgment an earlier Crown grantee was preferred to a later. I do not think that the use of the word prerogative in this passage is against the view now generally adopted, that the right is a right of property in the Crown.

The pursuers stated an argument on this point—the validity of the leases—which I am not sure that I fully appreciated. It was to the effect, if I understood it rightly, that it followed from the provisions of Magna Charta that a several right of fishery in the sea could not be created in England after a very early date—I think the reign of Henry II.; and that it followed from arts. 4 and 11 of the

Treaty of Union that these provisions of Magna Charta applied, after the Union to Scotland, and the conclusion seemed to be that there could be no valid grant of fishings in the sea which was dated later than the Union. I may have misunderstood this argument, which has the merit of ingenuity and originality, and which is very far-reaching, because it seems to apply to grants of salmon fishings as well as of mussels, and would have been open in many such cases, which have almost always been elaborately argued; as, for example, in *Gammell* v. *Commissioners of Woods and Forests*, (1859) 3 Macq. 419. But it was never, so far as I know, referred to. I am not fully informed about the law of England on this matter, but I am satisfied that it is not imported into Scotland by the Treaty of Union, and that questions as to the law of mussel fishings, like questions as to salmon fishings, depend solely on the law of Scotland, and have always been so treated in the Courts of Scotland and in the House of Lords.

I am, therefore, of opinion that a Crown grant of mussel fishings is, or may be, effectual to give an exclusive right to the grantee which will enable him to exclude the public.

The pursuers, however, maintained that, even if that were so, it did not solve this case, because there was no question in this case as to the validity of the leases, and it did not follow that the decree of declarator affirming the exclusive right of the Crown to the mussel fishings in question was well founded in law. They maintained, what seems a very difficult proposition, that the grant might be effectual although, prior to the grant, there was no exclusive right in the Crown. Their interest to maintain this proposition is not obvious, because the prosecutions to which they have been subjected have been at the instance of the Crown lessee or sub-lessee, and apparently they must have been so, because the Crown could not, except in the character of public prosecutor, pursue for the invasion of a right which had been given away by the lease to the Fishery Board. But that consideration does not seem to affect the pursuers' title to sue. The argument which they maintained seems to be to this effect—that, antecedently to the lease to the Fishery Board, the right to take the mussels from the mussel beds was in the public, and that, if it became a proprietary right, it became so by the grant itself, which, it was argued, was not an alienation of the Crown patrimony, but a limitation of the right of the public; and it cannot be said that this view, although I do not find it easy to follow, is unsupported by weighty authority. Apparently it was the view taken by Lord Barcaple in dealing with a grant of white fishings in the case of *Nicol* v. *Lord Advocate*, (1868) 6 M. 972. The pursuers founded on the case of *Grant* v. *Ross* (July 6, 1764) as supporting it; on Lord Barcaple's opinion; on a dictum by Lord Curriehill in *Argyll* v. *Robertson*, (Dec. 17, 1859) 22 D. 261; on Lord Barcaple's charge in *Lindsay* v. *Robertson*, (1868) 7 M. 239, and on the somewhat unsatisfactory case of *Hall* v. *Whillis*, (1852) 14 D. 324, which was about limpets and other small shellfish of the nature of bait, but in which the opinion of the Lord Justice Clerk, who adopted without qualification the doctrine of Balfour, may have gone further.

It is not easy to understand how one who has not a right can confer it, unless in the exercise of some special power from one in whom the right

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was vested; and I am unable to adopt that view, and do not think it consistent with the later decisions; and I am inclined to think that if it be admitted or settled in law that the Crown can confer a right to fishings which will give an exclusive right to the grantee, it is an inevitable inference that such exclusive right must have been vested in the Crown.

The next point of law arising in this case, which I think is quite settled, is that the solum of the estuary of the Clyde belongs in patrimonial right to the Crown, not in trust for the public, but as part of the estate of the Crown, although no doubt it is burdened by the rights of the public.

This was, in my opinion, conclusively decided in the case of the *Lord Advocate* v. *Clyde Navigation Trustees*, (1891) 19 R. 174, and I need not refer to other cases on that point, and need not do more than quote that case.

If I do not mistake, cases in regard to mussel fishings have all as yet been with Crown grantees, and none of them with the Crown. So that while the rights of the Crown grantees have been affirmed, I do not know that there has been an express judgment affirming the right of the Crown; so that to that extent this action seems to be novel. But the judgments in favour of the Crown grantees have, generally at least, proceeded on an affirmation of the right of the Crown, and I think these cases decide as to that right almost as authoritatively as though the Crown had been parties to them. I have quoted several of these authorities, and I do not think I need do more in addition than refer to the *Duchess of Sutherland* v. *Watson*, (1868) 6 M. 199, which is certainly much the most important case in the books on this question, and to my mind concludes the cause, at least in the Outer House. The following passage from Lord Cowan's judgment precisely expresses what I conceive to be the law on the point: "Mussel fishings," he says, "are, when not parted with by grant, within the patrimony of the Crown, without whose permission and consent, expressly or tacitly given, the public could not interfere with such fishings any more than with salmon fishings." That affirms expressly the case embodied in the decree under reduction; and I think it altogether in accordance with the judgment in *Duchess of Sutherland* v. *Watson*, and I consider that it is binding on me.

In the same case Lord Neaves ascribes the right of the Crown to ownership of the solum, and to the fact that it is the habit of mussels to remain attached to the mussel beds, and he holds that they are the property of the Crown as partes soli. This has not, so far as I know, been as yet made matter of express decision, but it appears to be reasonable and consistent with law and with the authorities, and to follow from the proposition that the solum of the estuary of the Clyde is the property of the Crown. If it be sound, it would follow that a disposition of the solum would confer a right to the mussel beds without any grant of fishing at all—a conclusion which has not yet been drawn, so far as I am aware, in any decision.

Further, I assent to the argument that the Act of 10 & 11 Vict. c. 92 imports a statutory recognition of the Crown right in this matter.

The law, according to the latest decisions, seems very well summarized by Professor Rankine. After stating that the right to take limpets, cockles, and other small shell fish is open to

all the lieges, he proceeds: "Oysters and mussels are in a different position. If the scalps on which they lie are situated within the three-mile limit, the Crown has an exclusive right as part of the hereditary revenue on one of two theories—either to the fish themselves as partes soli, in which case the Crown must be regarded as having a right to the ipsa corpora of the fish, or to the incorporeal right of fishing for them on the analogy of salmon fishings. The reasons for originally distinguishing between these and other shell fish seem to have been their greater value and adaptability not for bait only but for human food, and the importance of preserving them from indiscriminate fishing": Land Ownership, p. 238. Of the alternative theories here put forward by Professor Rankine, I would incline, if it were necessary to choose between them, to prefer that which regards mussels as partes soli, the theory put forward by Lord Neaves; but they do not seem necessarily to conflict.

On the whole, I think that the pursuers have not established that the decree in absence under reduction is erroneous in law and ought not to have been pronounced, and that therefore the defender is entitled to absolvitor.

1902. March 18. THE LORD PRESIDENT (LORD KINROSS), having stated the circumstances of the case, proceeded:—Some of the points involved in the case appear to me to be now so settled by decisions as to be beyond controversy, at all events in this Court. In the first place, I think it is so settled that the Crown has a proprietary right, not only in the foreshore, but also in the bed of the river Clyde and its estuary. In the case of *Lord Advocate* v. *Clyde Navigation Trustees*, 19 R. 174, it was held that the Crown has a right in the water and the solum of sea lochs, intra fauces terræ, below low-water mark, such as to entitle it to prevent persons from using them for purposes other than the recognised public uses, and that without any allegation of injury, actual or prospective, to these public uses, and opinions were expressed by the judges that the right of the Crown to the solum of sea lochs, intra fauces terræ, is a proprietary right and not merely a trust for the public. The considerations upon which this judgment proceeded are, in my opinion, equally applicable to the estuary of the Clyde at the place to which the present question relates. So in the case of *Lord Advocate* v. *Wemyss*, [1900] A. C. 48, it was held that the Crown, as the proprietor of the solum of the bed of the sea within the three-mile limit, may make a grant of minerals therein to a subject. Upon these and other authorities, it appears to me to be clear that the property not only in the banks, but also in the bed of the Clyde at the places where the mussel scalps in question are situated, belongs to the Crown, and that no one is, without the consent of the Crown, or of persons deriving right from the Crown, entitled to interfere with that property, or to remove anything which could truly be described as part of it.

The next question is whether mussel scalps, such as those to which this action relates, form part of the patrimony of the Crown, which the Crown can either administer by its officers or convey by disposition or let in lease to a subject. The nature of the right, if any, which the Crown has in mussel scalps on the shores or within three miles of the territory of Scotland has

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been much discussed from time to time; but I consider that it must now be taken to be settled, in so far as a series of decisions of this Court not brought under review of the House of Lords can settle a question of Scottish law, that such mussel scalps form parts of the patrimonial property of the Crown, which it can convey or let in lease to a subject, as it can any other patrimonial property belonging to it, and which is not from its nature inalienable. It is unnecessary to go through the earlier authorities upon this subject, as these are satisfactorily dealt with by the Lord Ordinary, and were very carefully considered in the cases to which I shall now advert.

In the years 1867 and 1868 the character and extent of the right which the Crown has, and can confer upon a grantee, in mussel scalps on and near the shores of Scotland, received much consideration from this Court in several cases. The first of these, *Lindsay* v. *Robertson*, reported June 13, 1867, 5 M. 864, May 29, 1868, 6 M. 889, and December 11, 1868, 7 M. 239, related to mussel scalps in the estuary of the river Eden near St. Andrews. In that case the question whether the pursuers had acquired an exclusive right of property in the scalps was tried before a special jury; and Lord Barcaple, the presiding judge, in charging the jury said: "The right to mussel fishings, and indeed the right to every kind of heritable property in Scotland, is originally and radically in the Crown, and no person has any heritable property, in any ordinary way at least, that has not come from the Crown by grant, either by expressed grant or by a presumed grant; and in regard to this particular matter of mussel fishing, it remains with the Crown while it has not been granted out as a patrimonial right—that is, it is a right which the Crown is entitled to deal with as its property"; and similar opinions were expressed by the other judges in the various stages of the case. The result of the case was that the right of the pursuers to the property of the scalps was affirmed. The case, however, in which the question was most fully considered was that of *Duchess of Sutherland* v. *Watson*, (Jan. 10, 1868) 6 M. 199, in which it was held that Her Grace, in virtue of a Crown grant of barony with fishings on the sands of Nigg, had a sufficient title on which to establish, by evidence of exclusive possession for the prescriptive period, an exclusive right to mussel scalps between high-water mark and low-water mark on these sands. The question whether the right of the Crown to mussel scalps on the seashore and in the sea within the three-mile limit is a patrimonial right, or a trust for the public, was much discussed in that case, with the result that the right was held to be patrimonial. One of the questions fully argued and carefully considered by the Court was whether the grants of mussel scalps or fishings, which it had admittedly been the practice of the Crown to make to subjects, were conveyances of a feudal estate by the Crown, as originally the owner and superior of the whole territory of the realm, or the creation by the Crown of an exclusive privilege or monopoly in favour of the grantee by an exercise of the Royal prerogative of something which did not belong to the Crown, and the Court, as I think, rightly, adopted the former of these views. In giving judgment Lord Cowan said: "Were such rights of fishing not such as to fall within the class of patrimonial rights of the

Crown, they could not be made the subject of a feudal grant to any of the lieges in individual property. That class of rights which is vested in the Crown as res publicæ is inalienable, except in certain special cases, such as rights of harbour or ferry, to which, when conveyed jure prerogativæ to a subject, are annexed conditions to secure their free use and enjoyment by all the lieges. Such is not the case with the right of fishing mussel banks or scalps in bays of the sea, or on the seashore. It is conferred as a patrimonial right." These decisions have settled the question, so far as this Court is concerned, for about thirty-four years, and many transactions in property have doubtless during that period been entered into and carried out in reliance on the view of the law which was so affirmed. If the right is thus patrimonial when granted to a subject, as I think it is, it is difficult to see how it could possess any other quality in the Sovereign before it was so granted; but this is the position which the pursuers maintain, and indeed must maintain in the present case.

I understood the counsel for the pursuers, in the very able argument which they addressed to us, to say that they did not dispute the soundness of the decisions in these cases, but they maintained that the cases related to old grants, and that the doctrines which there received effect did not entitle the Crown now, for the first time, to exclude the public from taking mussels from scalps which had never been granted to a subject. They contended that the Crown held the scalps as trustee for the public interest; that it could not now alienate the right in them to a subject, its alienable character having been taken away, as I understood them to maintain, by the legislation which has taken place with reference to mussel fishings within the last thirty-five years. They referred especially to the Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), which by Part III. (s. 27 et seq.) made provision for the granting of orders for the establishment or improvement and for the maintenance and regulation of oyster and mussel fisheries. It appears to me, however, that these provisions do not derogate from, but on the contrary recognise and conserve, the rights which the Crown had and still has in oyster and mussel fisheries, where they have not been granted to a subject. Thus, s. 46 provides that where any portion of the seashore proposed to be comprised in an order under that part of the Act belongs to Her Majesty, her heirs and successors in right of the Crown, but is not under the management of the Board of Trade, that Board shall not make the order without the consent of the Commissioners of Her Majesty's Woods, Forests, and Land Revenues, or one of them. The pursuers also submitted that this was the first case in which it had been proposed to invert the existing state of possession, and to exclude the public from taking mussels from scalps from which they had (as the pursuers allege) been previously in use, to take them as a matter of public right.

They further argued that the right which the Crown had in such fishings before they were granted to a subject was not a patrimonial right, but was in the nature of a franchise which the Crown could not communicate to one or more subjects to the exclusion of others. In other words, their contention was that mussel scalps were not vested in the Crown in the same way as land or other real estate,

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antecedently to a grant of them being made in favour of a subject, that a grant of them was not a conveyance of property previously vested in the Crown, but the exercise of the prerogative by which the Crown gave to a particular person what had previously belonged to the public as of common right, and that even assuming that such a grant jure prerogativæ had been competent in former days, it was not competent now, when the Legislature had by statute provided for the protection of mussel fisheries. Reference was made to English authorities in support of the view that such grants must be held to have been made in the exercise of the Royal prerogative, and not as conveyance of real estate, which according to the feudal system was originally vested in the Sovereign, and was granted by him to his subjects.

The only Scotch authority to which the pursuers were able to refer in support of this view was the report by Lord Kames of the case of *Grant* v. *Ross*, decided on July 6, 1764. This, however, appears to have been a question on which that eminent judge held different views from all the other members of the Scottish Bench at the time. In the case of *Ramsay* v. *Kellies*, (1776) 5 Bro. Supp. to Mor. Dict. 445; 2 Hailes, 722, he alone of all the judges laid down the doctrine that "the Crown has no right to give away an oyster scalp"—a doctrine at variance with all the subsequent decisions, as well as with all the statements of the text-writers. The Session papers in *Grant* v. *Ross* do not contain anything to warrant the statement with which the report sets out.

I do not know how the matter stands in England, but I am of opinion, for the reasons already given, and in respect of the authorities already referred to, that in Scotland the making of a grant of mussel scalps was not and is not an exercise of the Royal prerogative, withdrawing from the public any right which they had previously enjoyed and converting it to a private use, but was and is a conveyance to a subject of a part of what was originally the patrimonial right of the Sovereign in all the land or other real estate in the country. The feudal system was consuetudinary, varying in different countries, and this case should, in my judgment, be decided in accordance with the form which it took in Scotland, not with the form which it assumed in England, if these forms were different. In the case of *Officers of State* v. *Smith*, (1846) 8 D. 711, the Lord Justice Clerk said: "Anterior to any grant which may be founded on, the right" (to the seashore) "clearly is in the Crown as a right of property"; and again: "I cannot agree to view the Crown's dominant right and title, as even the Solicitor-General put it, merely as the right of a trustee for the public. It is a far higher right." Oyster and mussel fishings were most commonly granted as parts of a barony, but they were sometimes made the subjects of separate grants, and in these cases the symbol of infeftment was a shell. In other words, the grant was made and completed in the manner appropriate to proper heritable estate. An observation made by Lord Chelmsford in the case of *Commissioners of Woods and Forests* v. *Gammell*, (1859) 3 Macq. 463, in regard to salmon fishings seems to me to be equally applicable to mussel fishings. His Lordship said: "If the Crown held it for the public, the public could not be excluded by a grant to any of them." This dictum supports the view that mussel fishings must, until

alienated, be the property of the Crown, held for its own patrimonial benefit, not as a trustee for the public.

As to the contention of the pursuers that the course of recent legislation has taken away or affected any right which the Crown or its grantees had to mussel scalps as a patrimonial estate, it appears to me that that course of legislation, so far from supporting that contention, tends to negative it. That there might be a private right in mussel beds and in mussels is fully recognised by the first statute on the subject (10 & 11 Vict. c. 92), which provided, "That if any person in that part of the United Kingdom called Scotland shall wilfully, knowingly, and wrongfully take and carry away any mussel or mussel brood from any mussel bed, scalp laying or fishery, being the property and in the lawful occupation of any other person or persons, body corporate or politic, and sufficiently marked out or known as such, every such offender shall be deemed guilty of theft, and being guilty thereof shall be liable to imprisonment not exceeding the term of one year." Here, and in other sections, there is a clear recognition that prior to and apart from the Act a right of property might exist in mussel scalps, and also in the mussels upon these scalps.

For these reasons I am of opinion that the contention of the pursuers that the right conferred upon a subject by a Crown grant of a mussel scalp in Scotland is not a transfer of property which had previously been vested in the Crown, but an appropriation from the common right of the public, by virtue of the prerogative of what had not been a property or a patrimonial interest in the Crown, is not in accordance with the law of Scotland. On the contrary, I think that the right which the Crown possessed, and frequently granted to subjects, in mussel scalps on or near to the shores of Scotland, is a patrimonial right similar to that which, in theory at all events, the Crown originally had in the whole territory of the country.

The undoubted right of the Crown, in former times at all events, to alienate mussel scalps to a subject, has by some judges been explained upon the ground that mussel scalps and the mussels in them are partes soli, and could be conveyed to a subject in the same way as any other pars soli. While this consideration is not to be disregarded, and while the position of mussels in a scalp is not dissimilar to that of trees or other vegetation growing on land, or to seaweed on kelp shores, which were frequently made the subjects of grants, I think that the safer ground on which to rest my opinion is that the right to a mussel scalp and the mussels in it is similar to the right to any other heritable estate in Scotland, although the circumstance that mussels are so closely associated with the ground that it may correctly be said that they are part of it may have been one of the reasons which originally led to mussel scalps being regarded and treated as patrimonial property. The scalps are certainly, apart from the living mussels, partes soli, generally consisting of an aggregation of material, often of considerable thickness, and composed in no small measure of mussel shells and other remains of dead mussels. This close connection of mussels with the ground may, in their case as in the case of oysters, have led to their being treated differently by custom, decision, and legislation from floating fish (other than salmon) in the sea or in tidal

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waters, the right to take which is now free to all

With reference to the contention of the pursuers that, even assuming that a Crown grantee is entitled to protect the mussels in a scalp of which he is proprietor from being taken by the public, no such right of protection exists where the scalp has not been made the subject of a grant, but remains vested in the Crown or its officers, I may say that if I be correct in thinking that the right to mussels is patrimonial while it is vested in the Crown as well as after it is alienated to a subject, there can be no ground for holding that the Crown is not entitled to protect its property from depredation just as a subject would be entitled to do. It would certainly be most unfortunate in the public interest if the Crown did not possess this right, as if it did not possess it mussels would ere long cease to exist upon its scalps. But if it were necessary that the Crown should have made a grant of the scalps in some form to a third party in order to let in this right of protection, it would, in my judgment, be sufficient that the grantee is a lessee of the Crown, or a sub-lessee under the Scotch Fishery Board, as Dr. Fullarton is. I can see no reason for holding that a lessee, although his tenure is of a temporary nature, should not have the same right to protect the subject of his lease against depredation as a disponee would have to protect the subject of his permanent grant.

For these reasons I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

LORDS M'LAREN and KINNEAR concurred.

Agents for appellants: *Bramall, White & Roberts, for James A. B. Horn, S.S.C., Edinburgh, and Lade & Hood, Solicitors, Port Glasgow.*

Agent for respondent: *R. Ellis Cunliffe; Solicitor to Board of Trade, for John Blair, W.S., Edinburgh.*

[HOUSE OF LORDS.]

WILLIAM HANNAH (PAUPER) . . . . APPELLANT; H. L. (Sc.) 1904 July 4.

AND

JAMES HUNTER . . . . . RESPONDENT.

Practice—Discharge of Judgment by Consent — Compensation — Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42).

Where upon an appeal to the House of Lords the respondent petitions that the judgment of the Court below should be discharged and the case sent back for trial, the consent of both parties to that course must be brought before the House itself.

APPEAL from a judgment of the Second Division of the Court of Session, Scotland, dated October 31, 1903.

The appellant was William Hannah, labourer, and the respondent was James Hunter, sand and gravel merchant, Renfrew, Scotland. The appellant, who was fifty-five years of age, raised this action against the respondent under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), for compensation for personal injury for the loss of his arm in the following circumstances, as alleged by the appellant.

The respondent was the owner and captain of the steamship *Bonito*, and on November 24, 1902, he with other men were engaged by the respondent to discharge the cargo. On November 25 the appellant started work. The work was superintended personally by the respondent, and at other periods by the mate Robert Leitch. When the appellant started work in the morning the tide was low and the ship was a good deal below the level of the quay, and the only access from the quay to the ship provided by the respondent consisted of a ladder. The ladder was much too short to reach from the deck of the vessel to the quay, and by the instructions of the respondent, or the said Robert Leitch, it was lashed to the framework of a crane situated on the quay. When the work commenced the end of the ladder was several feet above the deck on which the appellant and his fellow workmen had to drop, but as the tide rose the ladder was raised and the top of it extended into the

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framework of the crane. The respondent admitted a ladder was used, but did not admit anything further. When the work was finished the appellant ascended the ladder, and just as he reached the top the crane for other purposes was set in motion, with the result that the appellant's right arm was caught between the ballast weight and the framework of the crane, and he sustained very severe injuries necessitating the amputation of his arm. To this allegation the respondent replied that the appellant had left his pipe on board, and that after the work was done, and wanting to point it out to his son, the appellant negligently went inside the guard rail of the crane, and the crane man, turning the crane in the ordinary working, the appellant was injured.

The appellant contended—(1.) that his accident was caused by the negligence of the respondent in respect that he failed to provide a ladder of sufficient length, with the result that the ladder had to be lashed on the quay, and (2.) that the lashing of the top of the ladder to the framework of the crane involved danger to those who had to use it, as the crane might be used at any time, and that in any event the respondent was liable to the appellant under the Employers' Liability Act, 1880. The case came before the Sheriff-Substitute of Lanarkshire on May 25, 1903, and he sustained the respondent's plea that the appellant's statements were irrelevant, and dismissed the action with costs. On October 31, 1903, the Second Division affirmed the Sheriff-Substitute's judgment.

The appellant appealed to this House, and petitioned to be allowed to sue in formâ pauperis, and the Appeal Committee (Lords Davey, James, and Robertson), on May 17, 1904, holding that the appellant had a primâ facie case under the Act of 1893 (56 & 57 Vict. c. 22)—that is a case where there was a fair chance of success—gave leave to appeal. Thereafter the respondent lodged a petition for the discharge of the interlocutors appealed from and that the case be sent back for trial on the merits. There being a doubt of the appellant's consent to the respondent's application, the petition was referred to the Appeal Committee. On June 23, 1904, the Appeal Committee (Lords Macnaghten, Davey, James,

Robertson, and Lindley) held that the consent of both parties to send the case back must go before the House itself; and they directed the parties to be heard by counsel at the bar of the House on the matter of the said petition without lodging printed papers.

On the petition coming before the House—

Church, appeared for the appellant.

D. Stephens, for the respondent (petitioner).

EARL OF HALSBURY L.C. What I have got before me is not a proper consent. This paper only consents to the extension of the time for lodging printed cases. There is nothing as to the appellant's consent to the discharge of the interlocutors.

Stephens. The appellant gave his consent when the case was before the Appeal Committee.

EARL OF HALSBURY L.C. We cannot act on that; we must have a proper consent filed.

Stephens. My learned friend Mr. Church, who is present, consents now for the appellant. Will your Lordships act on that consent, if the petition is properly amended?

EARL OF HALSBURY L.C. Yes, on a proper consent being filed.

THE HOUSE (Earl of Halsbury L.C., and Lords Macnaghten and Lindley) thereupon made an order in terms of the petition, discharged the interlocutors appealed from, with costs in this House usual in pauper cases, and remitted the cause back to the Court of Session with directions to allow a proof.

Lords' Journals, July 4, 1904.

Agent for appellant: *H. G. Church, for Oliphant & Murray, W.S., Edinburgh.*

Agents for respondent: *Holman, Birdwood & Co., for Maclay, Murray & Spens, Glasgow.*

[PRIVY COUNCIL.]

J. C.* 1904 April 20; May 14.

LUKEY AND ANOTHER . . . . . PLAINTIFFS;

AND

THE SYDNEY HARBOUR TRUST COMMISSIONERS . . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Sydney Harbour Trust Act, s. 68—*Construction—Right to levy Wharfage Rates on all Wharves vested in the Commissioners.*

Held, that s. 68 of the Sydney Harbour Trust Act authorizes the levy of wharfage rates on all wharves vested in the Commissioners, whether private, or public, or private sufferance wharves:

Held, also, that the appellants had no interest in the wharves in suit which under s. 27 would preclude the levy of rates. Their Crown leases thereof had expired, and after the passing of the Trust Act could not be renewed. A right as rent-paying tenants after the expiration of a Crown lease to occupy the wharves as their private wharves is not an interest within s. 27 of the Act, and would be ineffectual to exempt the appellants from liability.

APPEAL from a decree of the Full Court (May 9, 1902) dissolving an injunction granted by the judge in equity to restrain the respondents until the hearing of the suit or further order from preventing or interfering with the discharge of coal on to certain wharves in the port of Sydney, erected on lands formerly the property of the Crown, but at date of suit vested in the respondents under the provisions of the Sydney Harbour Trust Act, 1900.

This injunction had been granted in a suit brought, under the circumstances stated in their Lordships' judgment, by the Australian Gas Light Company through their secretary, the appellant Lukey, for a declaration that the respondents were not entitled to charge the company with any sum by way of wharfage in respect of coal discharged on the said wharves, for an injunction, and damages.

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD LINDLEY, and SIR ARTHUR WILSON.

The injunction was ordered on the ground in effect that the company had, at the time of the passing of the Sydney Harbour Trust Act, 1900, a licence enabling them, in consideration of the rents paid in advance, to occupy the wharves until the end of the year 1901; that the wharves vested in the respondents, subject to the interest (within the meaning of s. 27 of the said Act) of the company under such licence; and that the company was, until (at all events) the expiration of the year 1901, exempt from the payment of wharfage rates. It was reversed on appeal on the ground that the Commissioners had a right under the statute to levy wharfage dues on goods landed at the wharves in suit.

Haldane, K.C., and *B. Farrer*, for the appellants, contended that they were entitled to the injunction as ordered by the equity judge. The company were entitled to occupy the wharves during the years 1900 and 1901. They had paid rent for those years. The receipt and retention by the Crown of rent for those years created a licence to occupy them within the meaning of s. 29 of the Sydney Harbour Trust Act, 1900. Even if such payment and receipt and retention of rent did not create an actual licence in favour of the appellants to occupy the wharves, it at all events created an interest therein in the company. That interest was existing at the date of the passing of the Act of 1900 within the meaning of s. 27, and continued during the whole of 1901. Applications had been made by the appellants for renewal of their expired leases of these wharves. Until those applications were refused the company was in rightful occupation, as tenants paying rent. The Crown Lands Act, 1884, ss. 5 and 6, do not prevent the Crown from contracting, expressly or impliedly, with persons already in actual occupation of Crown lands under a valid lease thereof to allow them to continue in possession on the terms of such lease for some temporary period. Sect. 68, sub-s. 1, of the Sydney Harbour Trust Act, 1900, does not authorize the respondents to levy wharfage and tonnage rates except upon vessels berthed at public or private sufferance wharves, as those terms are defined in the earlier Acts, particularly that of 1880; and upon

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goods shipped on or unshipped from any vessels so berthed. No wharf of this company is either a public wharf or a private sufferance wharf. They are mere private wharves, not falling under either of those classes. The earlier Act did not authorize the levy of rates upon them. The later Act preserves the distinction (see s. 32), and similarly restricts the right of levy.

Asquith, *K.C.*, and *Vaughan Hawkins*, for the respondents, contended that, as they had been appointed Commissioners for the port of Sydney under the Sydney Harbour Trust Act, 1900, they were entitled and bound under the said Act to collect wharfage rates in respect of all goods discharged from vessels berthed at the wharves vested in them under the Act. The Act of 1880 referred to public wharves and private sufferance wharves, i.e., wharves for which a sufferance should be granted for the landing of goods subject to Customs duties. The Act of 1900 applied to all wharves vested in the Commissioners. Under s. 27 the wharves in suit vested in the respondents, "subject to the interest of any persons in such land existing at the time of the passing of the Act." No doubt the company were in actual possession of the wharves in suit; but they were Crown lands, and no interest had been created in them in favour of the company under the Crown Lands Acts, and no interest could be created otherwise which the respondents were bound to respect under s. 27. The respondents, therefore, were entitled and bound to prevent coals from being discharged at the said wharves, and in directing steamers to be removed to other wharves for unloading, unless the appellants paid the wharfage dues.

Haldane, *K.C.*, replied.

1904 *May* 14.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. The Australian Gas Light Company held leases from the Crown of certain wharves adjoining its own lands in Kent Street, Sydney, expiring on December 31, 1899, and a like lease of another wharf adjoining its own land at Mortlake, expiring on December 31, 1900.

Those leases were granted under the Crown Lands Act of 1884, which by ss. 5 and 6 prohibits, amongst other things,

the leasing of Crown lands except under and subject to the provisions of the Act, while ss. 89 and 145, with the regulations made under the last-mentioned section, lay down stringent conditions which must be complied with in order to give validity to such leases as those held by the company.

On November 28, 1899, while the Kent Street leases were still in force, the company applied for a renewal of them. And on January 31, 1900, while the Mortlake lease was still in force, the company applied for a renewal of that lease. Nothing is shewn to have been done at the time upon either of those applications; but the company continued in occupation of the wharves.

On January 21, 1901, the Under-Secretary for Lands wrote to the company regarding the Kent Street premises, referring to its "occupation" "of the sites of terminated special leases," and requesting the company to pay into the Treasury Department a sum of money, "being rent at the former rates for the years 1900 and 1901." Payment was made as requested, and a receipt was given headed "Suspense account," describing the money as "rent" on the expired leases, and adding the words, "Awaiting reference to Lands Department. Leases expired." A like payment was made on December 31, 1900, in respect of the Mortlake wharf, and a like receipt given.

On May 14, 1901, the company's application of November 28, 1899, for renewed leases of the Kent Street premises was refused by Government on the ground that the power to grant such leases had become vested in the Harbour Trust Commissioners under the Sydney Harbour Trust Act, 1900. The company's application of January 31, 1900, for a renewed lease of the Mortlake premises does not appear to have been specifically answered, but it is obvious that the legal disability was the same in both cases.

The Sydney Harbour Trust Act, 1900, just referred to and relied upon by the Government as having altered the legal position, was passed on February 11, 1901, and was declared to come into force on the previous November 1, 1900, which day was made the commencement of the Act. That Act constituted a body of Harbour Commissioners. Sect. 27 vested in

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them all Crown lands within the boundaries of the port, "subject to the interest of any persons in such lands existing at the time of the passing of this Act." Sect. 29 enacts that "No lease or licence in force at the commencement of this Act of or relating to any Crown land hereby vested in the Commissioners shall be in any manner affected by this Act."

Sect. 68 directs the Commissioners to collect in respect of all vessels berthed "at any wharf . . . . vested in the Commissioners or in respect of all goods . . . . shipped on or unshipped from any vessel so berthed wharfage and tonnage rates according to the provisions contained in the Wharfage and Tonnage Act of 1880 and Acts amending the same, which Acts are mutatis mutandis hereby incorporated . . . . subject to the provisions hereinafter mentioned; and all the powers therein contained are hereby conferred upon the Commissioners." Other provisions followed.

The Wharfage and Tonnage Act of 1880 so incorporated is an Act of general application in the Colony. It authorized the levy of inward and outward wharfage rates, not exceeding those in the schedule, on goods shipped or unshipped upon wharves of two kinds, public wharves and private sufferance wharves, both of which terms are defined; and the Act contains other provisions in connection with such wharves and such wharfage rates.

On May 29, 1901, the Commissioners claimed payment by the company of wharfage rates on coal unshipped at the Kent Street and Mortlake wharves since February 11, 1901, the date of the passing of the Sydney Harbour Trust Act, 1900. The correspondence which followed did not lead to an agreement. On August 27 the Commissioners gave notice that unless the company paid the wharfages already due, and agreed to pay them in the future, vessels would not be allowed to berth at the wharves after September 1. And in pursuance of this notice berths were refused to certain vessels.

The present suit was thereupon brought on September 6, 1901, by the company and by Gainford (who was interested in the matter by reason of his being under contract to supply coal to the company) against the Commissioners, claiming an

injunction, a declaration against the right of the Commissioners to wharfage, and damages.

A temporary injunction was, in the first instance, granted ex parte. This was followed by a motion to continue the injunction, on the hearing of which the case between the parties was fully gone into; and Walker J. made an order continuing the injunction, thus disposing of the whole suit on the merits. The Full Court on appeal unanimously reversed the decision of the learned judge, and dissolved the injunction. Against that decision the present appeal has been brought.

The question for decision is whether, as the learned judges of the Full Court held, the Commissioners had the right to levy wharfage dues upon goods landed at these wharves, for, if they had, everything else follows, and the appeal fails.

In the arguments before their Lordships the case for the appellants was placed upon two grounds. It was contended, first, that the Commissioners have power to levy wharfage rates only in the cases of public wharves and private sufferance wharves; and that, as the wharves in question are mere private wharves, not falling within either of those descriptions, s. 68 of the Sydney Harbour Trust Act did not authorize the levy of wharfage upon them. It was argued that, as the wharfage rates granted by that section are to be levied according to the provisions of the earlier Wharfage and Tonnage Act which is incorporated, and as that Act granted wharfage only upon two classes of wharves, the later Act must be similarly restricted. And, in support of this, it was pointed out that in s. 32, and perhaps in other places of the later Act, the distinction between private wharves and others is recognised as still subsisting, and as material for some purposes at least.

Their Lordships agree with the learned judges of the Full Court in thinking that the language of s. 68 of the Sydney Harbour Trust Act is too clear to admit of such an interpretation. The wharfage rates granted by it are to be levied according to the provisions of the earlier Act, but they are granted in express terms upon any wharf vested in the Commissioners.

It was contended, secondly, that by reason of the payment

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and receipt of rent in respect of the wharves for the year 1901, under the circumstances already stated, the company had at the date of the passing of the Sydney Harbour Trust Act an interest in the wharves within the meaning of s. 27, that that interest was valid for the whole year 1901, or, in the alternative, for a part of it, that it was protected by the words of s. 27, and that it was an interest of such a nature as to preclude the levy of wharfage rates by the Commissioners.

Their Lordships agree with the learned judges of the Full Court that this position is not tenable. The only interests in the wharves which the company ever contemplated acquiring were the leases for which it applied. The money was paid in the hope of acquiring those leases, but with knowledge that the obtaining of them was quite uncertain, for they never could be granted unless all the conditions prescribed by the law should be complied with; and the facts were clearly shewn upon the receipts accepted by the company. The leases never were granted, there never was any right to claim them which could have been enforced against Government, and with the passing of the Sydney Harbour Trust Act the possibility of their being granted by Government came to an end. Whether the company is entitled to claim a return by the Government of any part of the money paid is a question which does not arise in this suit or between these parties. Whether, if the Crown had proceeded against the company for damages as a trespasser, the company could have pleaded leave and licence in answer is a question which also does not arise. But it would be difficult to hold that the company had acquired an interest in the wharves without in effect holding that they obtained a demise in a manner rendered impossible by the Crown Lands Act.

But supposing it could be held that the company had an interest in the wharves, what would the character of that interest be? It could only be some kind of right, complete or incomplete, in the company to the possession or occupation or use and enjoyment of the wharves as its private wharves. And it has been already shewn that wharfage rates are to be levied on private wharves as well as on others. The supposed interest,

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therefore, which has been contended for would have been ineffectual for securing the object for which it was invoked.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants will pay the costs.

Solicitors for appellants: *Helmsley & Co.*
Solicitor for respondents: *G. M. Light.*

[PRIVY COUNCIL.]

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April 28, 29; *May* 14.

SMITH . . . . . APPELLANT;

AND

McARTHUR AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW ZEALAND.

New Zealand Interpretation Act, s. 5, sub-s. 7—New Zealand Licensing Act, 1895, s. 3—Construction—Effect of Licensing Poll being declared void.

Sect. 5, sub-s. 7, of the New Zealand Interpretation Act (1888, No. 15) provides that Acts should be liberally construed so as to ensure the attainment of the object of the Act according to its true intent, meaning, and spirit.

According to the literal meaning of s. 3 of the New Zealand Licensing Act of 1895, the appellant's publican's licence for an hotel in the Newtown district could not be renewed; for the last licensing poll of the electors having been declared void, a determination by the electors as required by that section had not been made.

But *held* that as, having regard to s. 2, sub-s. 3, and s. 8, sub-s. 4, of the same Act, and to s. 21 of the Licensing Act of 1893, the plain intention of the Legislature appeared to be that existing licences should continue until a determination had been made by the electors, effect must be given thereto; and accordingly a mandamus was directed to the respondents, the licensing committee of the said district, to hear and determine the appellant's application for a renewal.

APPEAL from an order of the Supreme Court (July 31, 1903) refusing a writ of mandamus to the licensing committee of the Newtown district to grant to the appellant a renewal of the

* *Present:* THE LORD CHANCELLOR, LORD LINDLEY, LORD KINROSS, and SIR ARTHUR WILSON.

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publican's licence formerly held by him in respect of Park Hotel.

The respondents were the licensing committee for the district. The appellant was lessee of the hotel, to which a publican's licence had been attached for a period commencing before 1896. It was situate within the electoral and licensing district of Newtown, which was constituted under the Electoral Acts on November 5, 1902, and is wholly comprised of parts of the previous electoral districts existing up to that date known as Wellington Suburbs and Wellington City respectively. Park Hotel was situate in the district of Wellington Suburbs.

On December 5, 1896, and again on December 6, 1899, licensing polls were duly taken under the Licensing Acts in each of the districts of Wellington Suburbs and Wellington City, the result in each case being that the proposal that the number of licences then existing should continue was carried. The licence for Park Hotel was duly renewed from time to time by the licensing committee for Wellington Suburbs district. The last of such renewals was on June 4, 1902, the licence then issued being in force to June 30, 1903.

On November 25, 1902, a licensing poll of the electors of Newtown district was taken under s. 4 of the Alcoholic Liquors Sale Control Act Amendment Act of 1895, but subsequently on an inquiry, held pursuant to s. 7 (*o*) of the said Act and the Regulation of Local Elections Act, 1876, this poll was duly declared void on the ground of irregularities committed by the officers appointed by statute to take it.

On June 5, 1903, the appellant applied to the respondents for a renewal of his licence. No objection was made under sub-ss. 1 to 4 of s. 81 of the Licensing Act of 1881, but at the meeting the licensing committee refused the appellant's application and all other applications for licences, holding that they had no jurisdiction to grant licences or renewals of licences within the district.

The appellant and four other applicants then commenced actions in the Supreme Court against the respondents for a mandamus (in each case) to the respondents to grant (or in the alternative to hear and determine) the applications respectively.

The Supreme Court dismissed the motions for a mandamus, the majority of judges holding that the effect of the poll being declared void was to deprive the committee of jurisdiction to issue or renew licences in the district. The effect of this construction of the Licensing Acts was described by one of the judges as "extraordinary and portentous," being in fact to establish total prohibition throughout the area of the Newtown district.

The material passage in the judgment of that Court is as follows. After holding that "although a poll had been held neither s. 4, sub-s. 3, nor s. 8, sub-s. 4, can have any application, for the whole proceeding has been set aside as the result of proceedings before the magistrate," it proceeded:—

"I can find no indication of any provision in the statutes which would, in my opinion, justify the Court in holding that, where a poll has been set aside, the licences existing when the poll was taken continue. In considering this question, s. 12, sub-s. 6, of the Act of 1893, under which the right of renewal is given, is, in my opinion, material. It limits the right of renewal to the two years succeeding the grant after the taking of a poll, while on the other hand s. 3 of the Act of 1895 prohibits the grant of a renewal of a licence until a determination has been come to. Assuming that the view I have taken of s. 4, sub-s. 3, and of s. 8, sub-s. 4, of the Act of 1895 is correct, the provisions of s. 12, sub-s. 6, of the Act of 1893 and of s. 3 of the Act of 1895 are consistent with the provisions of s. 4, sub-s. 3, and of s. 8, sub-s. 4, of the Act of 1895.

"I am therefore unable to find any material in the statutes regulating the granting of licences which will justify the Court in modifying the apparent meaning of s. 3. In my opinion the Legislature has not provided for the case which has arisen, and it is not the duty of the Court to supply a casus omissus. As was said by the Privy Council in *Crawford* v. *Spooner* (1), 'We cannot aid the Legislature's defective phrasing of an Act; we cannot add, and mend, and by construction make up deficiencies which are left there': per Lord Brougham,

(1) (1846) 6 Moo. P. C. 9.

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delivering the opinion of the Judicial Committee. Nor can we modify or alter the provisions of a statute from a consideration of what might be considered wise and prudent, or of what would have been done if an existing state of things had been contemplated by the Legislature, nor extend the language of a statute beyond its natural meaning for the purpose of including cases not provided for because no good reason can be found for their exclusion, nor can we, to use the language of Coleridge J. in *Gwynne* v. *Burnell* (1), 'let in the consideration of particular circumstances in each case, or a regard to a greater or less degree of convenience.' To do so would be to make, not to interpret, the law. A recent instance of the application of these principles is to be found in the case of *Reg.* v. *Dyott*." (2)

Danckwerts, K.C., Vaughan Hawkins, and *Skerrett,* for the appellant, contended that the decision of the Supreme Court was wrong, and that a mandamus should be directed to issue. They referred to the Licensing Act, 1881, No. 21, ss. 78, 81; 1893, No. 34, s. 21; 1895, No. 45, ss. 3, 8, 12. It was contended that under these Acts compulsory prohibition of the issue of all licences in any district cannot be established except as the result of a valid poll of the electors, at which a proposal to that effect has been carried by the necessary majority of the electors. Nothing of that kind had happened in this case. The Acts do not contemplate such a result in consequence either of a poll not being taken or of its being declared void for irregularity. The Acts assume that a valid poll will be taken triennially. Their plain object and intention are that the power to issue and renew licences should continue until otherwise directed at a poll. Sect. 3 of the Act of 1895 must not be so construed, in disregard of other provisions in the said Act, as to establish, in consequence of an accidental irregularity in taking a poll, total prohibition of the issue or renewal of licences for all time, or so as to deprive licensees of the benefit of the provisions intended for their relief when formally deprived of their licences by a vote of the electors. A con-

(1) (1839) 7 Cl. & F. 572, 607; 51 R. R. 43. (2) (1882) 9 Q. B. D. 47.

struction of that section ought to be avoided if possible which would effect the destruction of vested rights contrary to the plain intention of the Legislature otherwise to be deduced from the Act. Such a construction in this case produces results in the highest degree inconvenient and unreasonable, and is contrary to the true meaning and scope of the Acts.

Northcote, for the respondents, contended that according to the true construction of s. 3 of the Act of 1895 a valid determination by the electors upon the questions mentioned in that section was a condition precedent, which could not be disregarded, to the grant or renewal of any licences in the district. No such determination had been come to, for the last poll had been declared void. The condition had not happened necessary to give rise to the statutory power which the appellant asked should be exercised in his favour. Consequently the respondents had no jurisdiction to grant a renewal of the appellant's licence as prayed. The section was in full operation, as the period for which its operation was by s. 2, sub-s. 3, suspended had expired. Sect. 21 of the Act of 1893 does not apply to a district composed of parts of several former districts; moreover, since under the Act of 1895 the electoral polls and licensing polls are now held on the same day, the difficulty which the section was intended to cure no longer exists; and in any case the operation of the section was expended, as the period for taking the next poll had arrived. The returning officer could not have found under s. 8, sub-s. 4, of the Act of 1895 that none of the proposals was carried by the prescribed majority: his duty is to declare the result as ascertained by counting the votes recorded, and he is not concerned with the subsequent avoidance of the poll by the magistrate. In so far as the electors determined anything, it was that there should be no licences in the district.

Danckwerts, K.C., replied.

The judgment of their Lordships was delivered by

LORD LINDLEY. This is an appeal from a judgment of the Supreme Court of New Zealand, dismissing a motion for a writ of mandamus to the licensing committee of the Newtown

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district to grant, or in the alternative to hear and determine, the appellant's application for the renewal of his licence under the "Licensing Acts." The Court refused to do so on the ground that they had no jurisdiction to grant the application. The practical result of this decision is that, so far as the Newtown district is concerned, the Licensing Acts are brought to a deadlock. Existing licences in the district cannot be renewed, and no new licences in it can be granted.

The facts are as follows :—

The appellant had for some time been the holder of a publican's licence in respect of a hotel called the Park Hotel, and such licence was on June 4, 1902, renewed for the year ending June 30, 1903. At the date of such renewal the hotel was situate in the licensing district of Wellington Suburbs.

Under a proclamation by the Governor of New Zealand, dated August 13, 1902, which came into effect on November 5, 1902, a new electoral district was duly constituted under the name of the Newtown Electoral District, consisting of parts of the previous electoral districts of Wellington Suburbs and Wellington City and comprising the said hotel; and such new electoral district thereupon became, under the provisions of the Licensing Act, 1881, and the Acts amending the same, a licensing district.

On December 5, 1896, and again on December 6, 1899, licensing polls were duly taken under the Licensing Acts in each of the districts of Wellington Suburbs and Wellington City, the result in each case being that the proposal that the number of licences then existing should continue was carried. The licence for the Park Hotel was duly renewed from time to time by the licensing committee for Wellington Suburbs district. The last of such renewals was on June 4, 1902, the licence then issued being in force to June 30, 1903.

On November 25, 1902, a licensing poll of the electors of Newtown district was taken, under s. 4 of the Act of 1895, but subsequently on an inquiry, held pursuant to s. 7 (*o*) of the said Act and the Regulation of Local Elections Act, 1876, this poll was duly declared void on the ground of irregularities committed by the officers appointed by statute to take it.

The respondents were afterwards duly elected members of the licensing committee for the Newtown district, and on May 7, 1903, the appellant gave notice of his intention to apply, and on June 5, 1903, at the annual licensing meeting for Newtown district, he applied to the respondents for a renewal of his licence. No objection was lodged or made affecting the appellant or his house, but the licensing committee refused his application and all other applications for licences, holding that they had no jurisdiction to grant licences or renewals of licences within the district.

The appellant and four other applicants then commenced actions in the Supreme Court against the respondents, the licensing committee, for a mandamus (in each case) to the respondents to grant (or in the alternative to hear and determine) the applications respectively.

The appellant's motion for a mandamus was heard (together with similar motions in the four other actions) before the Supreme Court (consisting of Stout C.J. and Denniston, Conolly, Edwards, and Cooper JJ.) on July 8, 9, 14, 15, and 16, 1903. Judgment was reserved, and on July 31, 1903, the Court (by a majority of three judges against two) gave judgment dismissing the appellant's motion for a mandamus with costs. Hence this appeal.

The Licensing Acts which have to be considered are those of 1881, 1882, 1889, 1893, 1895, and 1902.

The difficulty which has arisen turns mainly on the true construction of s. 3 of the Act of 1895, taken in conjunction with s. 2, sub-s. 3, of the same Act, and of s. 21 of the Act of 1893. Their Lordships will deal with these presently, but it must not be forgotten that there is in New Zealand a statutory Interpretation Act (1888, No. 15). By s. 4 of that Act "Words importing the singular number include the plural number." By s. 5 (clause 2) amending Acts are to be read as incorporated with the Acts amended, and by clause 7 "Every Act and every provision or enactment thereof shall be deemed remedial . . . . and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit."

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Passing now to the sections of the Act of 1895 above referred to, s. 3 is clear and free from all ambiguity; it runs thus:—

"No licence of any description shall be granted or renewed until the electors of the district have previously determined in manner hereinafter provided—

"(1.) Whether the number of licences existing in the district is to continue.

"(2.) Whether the number of licences existing in the district is to be reduced.

"(3.) Whether no licences are to be granted in the district."

The "manner hereinafter provided" is to be found in ss. 4 to 7, and is by a poll of the electors of the district, which poll (called the "licensing poll") is to be taken on the day appointed for the electoral poll and simultaneously with such poll.

If this section stood alone there could be no renewal of the appellant's licence until a licensing poll for the Newtown district had determined the questions above mentioned, and so long as there is no licensing poll for that district there can be no renewal.

But s. 2, sub-s. 3, says that "s. 3 of this Act shall not come into operation until the day next before the day appointed for the . . . . licensing poll first taken after the commencement of this Act." This, it will be observed, is a postponing section only. But the effect of the two sections together seems plainly to be that s. 3 is to come into operation on the day appointed for the licensing poll described in s. 2, sub-s. 3, as the licensing poll first taken after the commencement of the Act. The Act came into operation on October 31, 1895. It is evidently assumed, however, that the licensing poll referred to will be taken. The contingency that there will be no poll, or that the poll taken in fact will be legally null and void, seems, however, to be covered by s. 8, sub-s. 4, which is as follows:—

"If the returning officer finds—

"That none of the proposals respecting licences in the district is carried by the prescribed majority,

"Then he shall notify the licensing committee thereof, and the number of licences shall continue as they are until the

taking of the next licensing poll, subject nevertheless to the power of refusing to renew licences objected to under sub-ss. 1–4 inclusive of s. 81 of the principal Act" (the Act of 1881), "and subject also to the provisions of the Licensing Acts relating to forfeiture or increase of licences."

In connection with these sections there is another specially applicable to new districts, namely, s. 21 of the Act of 1893. This section is as follows:—

"Where a district constituted under this Act or the principal Act has been abolished or altered, and has been constituted or divided into new districts, the poll in force in such first-mentioned district at the time of such abolition or alteration shall continue and remain in force in such new districts until the period arrives for taking the next triennial poll, and shall have the same force and effect as if such poll had been taken in such new districts."

Although this section speaks of "a district," the Interpretation Act already referred to justifies a construction which will make the section applicable to one or more new districts constituted out of two or more previously existing districts. The section is as much required in the last case as in the case of a sub-division of only one district, and although it may be true that the section was inserted to meet the inconvenience arising from the creation of new districts out of one old district, their Lordships see no reason for confining this section to that particular case.

The object aimed at by the Legislature is plainly apparent from the enactments above referred to. Subject to any objections which might be made to any particular licensee or house, the object of the Legislature plainly was to continue in every district and new district formed out of it all existing licences until a licensing poll should have decided which of the three courses mentioned in s. 3 of the Act of 1895 should be pursued in that district. The difficulty of giving effect to this intention in this particular case is due entirely to the fact that s. 2, sub-s. 3, is so expressed as to postpone the operation of s. 3, not to the decision of the poll, but to the day before the day appointed for taking it. But s. 8, sub-s. 4, shews that

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existing licences may, in certain cases, continue in force beyond that day.

The language of s. 21 of the Act of 1893 is more elastic than the language of s. 2, sub-s. 3, of the Act of 1895. In both cases, however, the language points to a time rather than to the event which was to happen at that time, but the event, i.e., the result of the poll, is the governing factor. To ignore this, and to adhere to language so literally as to defeat the plain intention of the Legislature instead of so construing the words as to give effect to that intention, is to run counter to s. 5, sub-s. 7, of the Interpretation Act, which, after all, only expresses what is meant by the old legal maxim, "Qui haeret in littera haeret in cortice."

Their Lordships will, therefore, humbly advise His Majesty to allow the appeal, and to order a mandamus to issue to the licensing committee to hear and determine the appellant's application, and to order the respondents other than Alexander McArthur, who was a nominal defendant only, to pay the costs of the action.

The respondents, other than the first respondent (Alexander McArthur), must pay the costs of the appeal.

Solicitors for appellant: *Blyth, Dutton, Hartley & Blyth.*
Solicitors for respondents: *Shaen, Roscoe, Massey & Co.*

[PRIVY COUNCIL.]

NEWFOUNDLAND STEAM WHALING COMPANY, LIMITED . . . . . } PLAINTIFFS;

AND

GOVERNMENT OF NEWFOUNDLAND DEFENDANTS.

J. C.*
1904
May 4, 5; June 7.

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND.

Newfoundland Whaling Industry Act, 1902—*Construction—Licences.*

Licences under the Newfoundland Whaling Industry Act, 1902 (2 Edw. 7, c. 11), can only be granted by the Governor in Council in the manner prescribed by the Act.

A receipt for a licence fee, not granted by the Governor and not containing words appropriate to the grant of a licence, is not a licence, and cannot operate as such. Nor can it be evidence of a contract to grant a licence in terms of the application.

APPEAL from an order of the Supreme Court (Oct. 28, 1903) dismissing the appellants' petition, filed against the Government under s. 135 of the Judicature Act, 1889.

It prayed for a decree that they were entitled to receive a licence under the local Whaling Industry Act, 1902 (2 Edw. 7, c. 11), for the area or section of the coast described in their application to the Governor in Council, for amendment of the licence already granted so far as it related to area, and for a new licence and other relief.

Under the circumstances stated in their Lordships' judgment the appellants alleged and the respondents denied that the former had a right ex contractu to the area claimed.

The Supreme Court held the petitioners had failed to establish the alleged contract.

Sir J. S. Winter, K.C., and *Mackarness*, for the appellants, contended that they were not bound to accept a licence for a less area than that applied for. The Government could grant or refuse the application, but had no power without the

* *Present:* THE LORD CHANCELLOR, LORD LINDLEY, LORD KINROSS, and SIR ARTHUR WILSON.

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appellants' consent to reduce the area. When a licence had once been granted and acted upon, as in this case, it could only be revoked or forfeited for statutory reasons, of which none were alleged. They referred to the Act of 1902, ss. 1, 2, 3, 7, 8, 18. They contended that on the evidence it was established that the Government had promised to grant a licence as prayed, had accepted the licence fee, and had granted a receipt in terms which operated as an interim licence, and which had been recognised as having that effect in the memorandum attached to the formal licence subsequently granted for the less area. In the belief that the licence was granted, or agreed to be granted, as prayed, the appellants had expended large sums in permanent works on their factory, and had continued their operations on their present site instead of removing to another.

Haldane, K.C., and *W. Baker*, for the respondents, were not heard.

1904
June 7.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. The Act to regulate the whaling industry was passed on April 22, 1902, and came into operation the same day. It made it illegal for any person to engage in the whaling industry, or in the manufacture therefrom, without a licence to be granted and issued as provided by the Act, subject to penalties recoverable by an informer. Sect. 2 required persons intending to apply for a licence to publish notices specifying, amongst other things, the area in respect of which it is to be applied for, and the intended site of the factory.

Sect. 3 empowers the Governor in Council to issue licences; and (1.) no licence can be issued until the site of the factory shall have been approved by the Governor in Council, and such site must not be within fifty miles of another factory; and (2.) the licence must define the area to which it is to apply, and within which no other factory can be erected. It must also describe the site of the factory sanctioned.

Sect. 7 imposes an annual duty of $1500 on each licence. Sect. 8 provides for the forfeiture of licences for breach of their

conditions. Sect. 18 deals specially with the case of factories at work or in course of erection at the time of the passing of the Act. Licences to such factories are subject to the same rules as those applicable to new factories, except those relating to the publication of notice and the approval of the site.

The appellants are the proprietors of two factories, but only one of these, that at Rose-au-Rue, is the subject of the present appeal, and the other need not be further mentioned. The Rose-au-Rue factory was practically completed when the Act passed, and it therefore fell under the provisions of s. 18.

During the whaling season of 1902 the appellants carried on the whale fishery in connection with the Rose-au-Rue factory without obtaining or applying for a licence, thus rendering themselves liable to penalties, and at the same time depriving the Treasury of the duty chargeable upon a licence. On November 13, 1902, the Minister of Marine and Fisheries wrote, by the direction of the Governor in Council, to the agent of the appellants calling attention to the Act, and to its violation by the appellants, and adding, "Might I request you to give this matter of application for a licence . . . . your earliest attention." On December 12 the appellants applied accordingly for a licence, and in their application described the limits to which they desired its operation to extend, and they specified the factory as Rose-au-Rue. On December 15 the appellants paid a sum, including $1500 in respect of the Rose-au-Rue factory, by a cheque in favour of the Minister of Marine and Fisheries. It is said that an official of that department had previously asked for payment of the licence fee. A receipt was given, signed by the Minister of Marine and Fisheries, for the $1500, describing it "as a whaling licence fee for a factory operated at Rose-au-Rue, ... being the amount due for the year 1902." On July 4, 1903 (a fresh year having then commenced as defined in s. 7 of the Act), another payment of $1500 was made, and a receipt for it given in terms similar to those of the previous receipt.

On August 26, 1903, a licence was issued headed "Whaling Certificate," tested in the name of the Governor, signed by command of the Governor by the Colonial Secretary, and

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sealed with the public seal of the Colony. The printed form originally had at the foot a form of receipt, but upon the receipt, and so as to obliterate it, are written the words: "This certificate is to supersede and takes the place of the licence which the within-named licensee holds in the form of a receipt and under which he has carried on his business." The licence so granted defined the area within which it was to operate, and the area so defined was narrower than that described in the appellants' application, though extending to the fifty miles required by the Act. The appellants objected to the licence thus issued, and claimed to have one for an area co-extensive with that defined in their application. The Government refused to comply with this claim.

The appellants thereupon commenced the present proceedings, in accordance with the practice in force, by a petition filed in the Supreme Court against the Government of Newfoundland. Having stated the facts, they claimed, so far as is now material, first, a decree to the effect that they were entitled to a licence for the area described in their application; secondly, an amendment of the licence, so as to make it include that area. The Attorney-General filed his answer. The case came on for hearing before the Supreme Court, and the Court by a majority dismissed the appellants' case. Against that decision the present appeal has been brought.

The argument for the appellants was put in the following way: That the Minister's letter of November 13, 1902, amounted to a promise to grant to the appellants a licence, in accordance with the Act, upon a proper application, though for an area not yet defined. That the appellants' application of December 12 defined the area, and that upon that it was for the Government either to grant or refuse the licence as asked for. That by acceptance of the money and the receipt given on December 15 the Government accepted the area as defined in the application. And, therefore, it was contended that either the receipt operated as a licence having effect over the whole of that area, or else the receipt, in conjunction with what had gone before, amounted to a binding contract to grant such a licence. The appellants specially relied upon the

memorandum, at the foot of the licence actually issued, as shewing that the receipt had been intended as a licence, and as a ratification of it in that sense.

The system of licences and the machinery for carrying it into effect are created by the statute, and, as in all such cases, the provisions of the statute must be complied with. The licence must be granted by the Governor in Council, and it must contain what the Act requires. The receipt does not purport to be issued by the Governor in Council. It contains no words appropriate to the grant of a licence. It does not, either by its own language or by reference to any other document, define the area over which it is to take effect. The memorandum at the foot of the licence as issued, assuming (which is not clear) that that memorandum forms part of what is verified by the seal of the Colony and the test of the Governor, could not make that a licence within the Act which was not so in fact. And to give to the memorandum the effect suggested would be to make it contradict the express terms of the official document to which it is appended. Their Lordships are clearly of opinion that the receipt was not a licence.

It is equally impossible to accept the contention that there was a contract to grant the licence as claimed. To support the argument it would be necessary to attribute to every document a meaning which it cannot bear. The argument assumes that the letter of November 13, 1902, amounted to a promise to grant a licence. The letter contains nothing of the kind. The argument assumes that the receipt of December 15 was an acceptance of the limits specified in the appellants' application. It contains nothing of the kind. So that even assuming that the difficulties created by the statutory procedure could be got over, and that every document was issued by the competent authority, the contention would wholly fail on the facts.

It was also argued, but not very strenuously, that the Government was in some way estopped from denying the appellants' right to what they claim. Their Lordships agree with the majority of the learned judges in the Supreme Court

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that there is no room in law for such a contention in the present case. They also think that there is no ground for it in fact, because they cannot find anywhere any representation on behalf of the Government on which the appellants could act that the licence about to be issued embodied the limits defined in the appellants' application.

It is true, no doubt, that complications have arisen in the present case, and it may be that the appellants have been placed in a position of difficulty, and possibly of some hardship. But if so, the real source of all the inconveniences has been the action of the appellants themselves in carrying on their business after the passing of the Act without taking proper steps to comply with its terms.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants will pay the costs.

Solicitor for appellants: *B. Wilkinson.*
Solicitors for respondents: *Burn & Berridge.*

[PRIVY COUNCIL.]

GLENWOOD LUMBER COMPANY, LIMITED . . . . . } DEFENDANTS;

AND

PHILLIPS . . . . . PLAINTIFF.

J. C.*
1904
April 21;
May 14.

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND.

Consolidated Statutes of Newfoundland (2nd *Series*), *c.* 13, *s.* 51—*Effect of Grant of Licence—Trespass on Licensee's Land before Licence granted—Damages.*

A licence granted by the Government to the respondent in pursuance of s. 51 of c. 13 of the Consolidated Statutes of Newfoundland (2nd Series), giving an exclusive right of occupation of land, though subject to reservations or to a restriction as to its user, is in law a demise of land.

Prior to its grant the appellants, expecting and believing that they would obtain the licence, commenced cutting timber on the land comprised therein, and continued to do so until three days after its grant, notwithstanding a formal notice from the respondent; and after that date they removed the logs so cut:—

Held, that the appellants were wrong-doers, and that the respondent as lessee had lawful possession of the logs so cut, which established a good title against the appellants with a right to consequent relief—that is, to the value of the logs removed without deducting the expenses of the said wrongful acts except so far as agreed.

APPEAL from a decree of the Supreme Court (April 2, 1901) affirming a decree of Morison J. (Aug. 27, 1900).

The respondent sued, under the circumstances stated in their Lordships' judgment, to recover damages in respect of the appellants' trespass in entering on his lands on January 20, 1899, and divers other days, and wrongfully cutting down trees and detaining certain logs (in all 15,920) of timber. He also claimed an injunction.

The appellants continued to cut timber till January 23; and thereafter continued to saw up and haul the timber so cut till stopped by injunction on June 10, 1899.

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD LINDLEY, and SIR ARTHUR WILSON.

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With regard to the respondent's title, it was notified to him that two licences had been duly granted to him on November 16, 1898, and a formal licence in the nature of a lease in respect of the lands covered thereby was granted on January 20, 1899. The trespass began on November 20.

The appellants contended that the respondent acquired no title under the licences, and could not recover for any logs cut before the said January 20, 1899; also, that the lease was void as certain formalities had not been observed.

Morison J. was of opinion that, the licence having been granted before November 20, the respondent had a good title at the date of the trespasses. The appeal from his decree was dismissed.

Sir J. S. Winter, K.C., and *W. H. Cozens-Hardy*, for the appellants, contended that the respondent had not a good title. He was not in possession of either land or trees, or any claim or title except under the licence granted by the Crown on January 20, 1899. Under its terms, as well as under the Act which authorized its grant, namely, Consolidated Statutes, c. 31, s. 51, sub-s. 7, the rights and title conferred upon the respondent by the licence were limited to such logs as were cut during its continuance. The right conferred was to cut logs and carry them away. The logs cut by the appellants before the respondent's title accrued did not vest in the respondent; and, as between lessor and lessee (assuming the respondent to be lessee), the logs found by him on his land were the property of the lessor—that is, of the Crown. Reference was made to *Herlakenden's Case* (1) and *Reg.* v. *Townley*. (2)

Eldon Bankes, K.C., and *Dumas*, for the respondent, contended that the respondent had a good title to the land at the date of the trespasses; being in possession under licences which have been notified to him as having been duly granted. On the true construction of the licence of January 20 and the section referred to he was lessee with the rights of lessee. The appellants were wrong-doers, and the respondent, being in possession of the logs as lessee under his licence, had a good

(1) (1589) 2 Coke, Pt. IV. 63. (2) (1870) L. R. 1 C. C. 315.

title as against them; which they could not defeat by setting up the rights of his lessor.

Sir J. S. Winter, K.C., replied.

May 14. The judgment of their Lordships was delivered by

LORD DAVEY. In the year 1898 the appellants and the respondent Phillips respectively applied to the Governor in Council of the Colony of Newfoundland for licences to cut timber on certain blocks of timber land near the Main River flowing into Gander Lake in that Colony. The respondent Phillips is hereafter referred to as the respondent.

The practice appears to be for such applications to be first considered in the Colonial Secretary's office, and if they are approved a notification is sent to the Minister of Agriculture and Mines, from whose office the licences are then issued. On November 16, 1898, the Deputy Colonial Secretary wrote a letter of that date to the Minister of Agriculture and Mines, inclosing four licences to cut timber, which (he stated) had been approved by His Excellency the Governor, and which had been granted to the following persons, namely, to the respondent two blocks, one of which is the area in question in this litigation, and to the appellants two other blocks.

The respondent's agent was informed by the Colonial Secretary on November 15, 1898, that the grants to him had been passed, but no licence was issued until January 20, 1899.

On October 17, 1898, the appellants, without any title to do so, but (as stated in their case) "expecting and believing" that their application would be granted by the Government, commenced cutting timber on land which was comprised in the licence afterwards granted to the respondent, and they continued such cutting, notwithstanding a formal notice from the respondent, until January 23, 1899. At that date the timber which had been cut by the appellants either lay on the ground or was piled on the land near the river. None of it was removed until after January 23.

The respondent's licence, which was dated January 20, 1899, was granted under the Great Seal of the Colony, in pursuance of s. 51 of c. 13 of the Consolidated Statutes of Newfound-

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land (2nd Series). The Crown thereby "licensed" to the respondent, his executors, administrators, and assigns, all that tract, piece, or parcel of land particularly described, to hold for the purpose aforesaid (i.e., for cutting the timber thereon), for the term of twenty-one years from the date of the licence, at an annual rental of $96, and the payment of a bonus of $40 on execution. There was a proviso that persons might at all times make and use roads upon and travel over the ground licensed, and that nothing therein contained should prevent any person taking standing timber without compensation to be used for certain public works by the Government, the authority of the Surveyor-General being first obtained, and that persons settling by lawful authority within the ground licensed should not be interrupted in clearing and cultivation by the licensee.

The appellants contended that this instrument conferred only a licence to cut timber and carry it away, and did not give the respondent any right of occupation or interest in the land itself. Having regard to the provisions of the Act under the powers of which it was executed and to the language of the document itself, their Lordships cannot adopt this view of the construction or effect of it. In the so-called licence itself it is called indifferently a licence and a demise, but in the Act it is spoken of as a lease, and the holder of it is described as the lessee. It is not, however, a question of words but of substance. If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself. By sub-s. 7 of s. 51 of the Act it is enacted that the lease shall vest in the lessee the right to take and keep exclusive possession of the lands described therein subject to the conditions in the Act provided or referred to, and the lessee is empowered (amongst other things) to bring any actions or suits against any party unlawfully in possession of any land so leased, and to prosecute all trespassers thereon. The operative part and habendum in the licence is framed in apt language to carry out the intention so expressed in the Act. And their Lordships

have no doubt that the effect of the so-called licence was to confer a title to the land itself on the respondent.

Subsequently to January 23, 1899, the appellants proceeded to remove the logs which they had cut before that date. On June 20, 1899, the respondent commenced an action against the appellants. In the statement of claim it is alleged (1.) that the appellants, on January 20, 1899, and divers other days, wrongfully entered on the respondent's land and cut down respondent's trees; (2.) that the appellants detained from the respondent the respondent's goods and chattels (that is to say) 15,500 logs, and the respondent claimed a return of the said goods and chattels or their value, and by the third paragraph the respondent claimed an injunction. The defence was a traverse of the allegations in paragraphs 1 and 2. This defence was, after trial, amended by adding specific allegations that the land described was not the respondent's land, that the trees stated to have been cut down were not the respondent's trees, and the logs stated to have been detained were not the respondent's logs.

The action was tried before Morison J., and by his judgment, dated August 27, 1900, it was adjudged that the respondent should recover from the appellants 521,979 feet of lumber then piled in the appellants' mill, or $3132, their value, and $468 for other lumber, and $400 damages and costs, and that a sum of $1174.50 (which the respondent had agreed to pay to the appellants for sawing the logs after the date of an interlocutory injunction) be set off against the damages and costs.

There was an appeal from this judgment, which, by an order dated April 2, 1901, was ordered to be dismissed with costs. The present appeal is from the latter order.

The first and principal point taken for the appellants at their Lordships' bar was that the logs, having been cut before the date of the commencement of the respondent's title, did not vest in, and were not the property of, the respondent. It was also contended that at any rate an alteration should be made in the details of the judgment.

An endeavour was made by the learned counsel for the appellants to restrict the second paragraph of the statement of

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claim to logs cut after January 20, 1899. Their Lordships cannot accept this narrow construction of the statement of claim, and they think that the action was in substance for trespassing on the respondent's lands and for detinue of the logs removed from his lands after January 20, 1899. The action was in fact so treated by the learned judge at the trial. It was then said that at any rate the logs were, as between the respondent and the Crown, the property of the Crown.

The answer to this argument is that the appellants were wrong-doers in every step of their proceedings. There is not a hint in either the pleadings or the evidence of any title in the appellants to cut the trees. Indeed, any such title is negatived by their own statement in their case that they acted in expectation only that they would afterwards acquire a title, and by the evidence of Mr. Mews, the Deputy Colonial Secretary. And their Lordships cannot listen to the suggestion of counsel that the appellants may have had a licence from the Crown. The appellants were wrong-doers in entering on the lands of the respondent for the purpose of removing the logs, and also in removing the logs, which were certainly not their property.

The respondent, on the other hand, was, in their Lordships' opinion, lessee and occupier of the lands, and, as such, had lawful possession of the logs which were on the land. It is a well-established principle in English law that possession is good against a wrong-doer, and the latter cannot set up a jus tertii unless he claims under it. This question has been exhaustively discussed by the present Master of the Rolls in the recent case of *The Winkfield*. (1) In *Jeffries* v. *Great Western Ry. Co.* (2) Lord Campbell is reported to have said: "I am of opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him having no title in himself is a wrong-doer, and cannot defend himself by showing that there was title in some third person, for against a wrong-doer possession is title." The Master of the Rolls, after quoting this passage, continues: "Therefore it is not open to the defendant, being a wrong-doer, to inquire into the

(1) [1902] P. 42. (2) (1856) 5 E. & B. 802, at p. 805.

nature or limitation of the possessor's right, and unless it is competent for him to do so the question of his relation to, or liability towards, the true owner cannot come into the discussion at all, and therefore, as between those two parties, full damages have to be paid without any further inquiry." Their Lordships do not consider it necessary to refer at any greater length to the reasoning and authorities by which the Master of the Rolls supports this conclusion, and are content to express their entire concurrence in it.

The learned counsel for the appellants recently moved before their Lordships for leave to make a further statement as to matters which he said had not been considered in the argument. The application was unusual, but their Lordships thought it better to hear the motion. Attention was then drawn to the statement in the judgment of the learned judge as to the agreement of September 7, 1899, entered into between the parties in the course of the litigation. The agreement itself is not in the record, and is not referred to in the appellants' case, and it was obviously not intended to be relied on in support of their appeal. Nor does it appear to their Lordships to give them any assistance. The words used by the learned judge, of course, mean the property of the plaintiffs as between the parties to the action, and there is no evidence of any intention to vary the rights of the parties or to determine the rights of third persons who were not parties to the action.

These considerations dispose of the appellants' principal point, and it is unnecessary for their Lordships to discuss the opinion expressed by Morison J., that the communication to the respondent that his application for a licence had been granted would give him as from that date a good title to the logs, although the licence was not completed until a later date.

The appellants' point on the form of the judgment is that the learned judge should have allowed them as against the respondent the expenses of cutting the trees and floating the logs down the river, as well as the expenses of sawing and piling. The latter expenses were allowed by arrangement

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between the parties. There was no arrangement as to the former. Their Lordships think that the judgment is in the form usual in actions for detinue, and it would not be right to impose on the respondent the obligation of paying the appellants the expenses of their wrongful acts as a condition of recovering what must be considered in this action as his property, although such expenses might properly, but would not necessarily, be taken into account in estimating the alternative damages.

Their Lordships will humbly advise His Majesty that the appeal be dismissed, and the appellants will pay the costs of it, including the costs of the motion made by Sir James Winter subsequent to the hearing.

Solicitors for appellants: *Burn & Berridge.*
Solicitors for respondent: *Godden, Son & Holme.*

[PRIVY COUNCIL.]

J. C.* 1904 *June* 8.

THE KING . . . . . APPELLANT;

AND

LOUW . . . . . RESPONDENT.

Ex parte THE ATTORNEY-GENERAL FOR THE CAPE OF GOOD HOPE.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Practice—Special Leave—Abstract Point of Law.

Special leave will not be granted to appeal from a judgment which is not impeached, merely with a view to have an abstract point of law, not arising in the case, decided by their Lordships.

THIS was a petition by the above-named appellant for special leave to appeal from the determination of the Supreme Court on February 18, 1904. It alleged that on November 24,

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

1903, the respondent was found guilty of assaults (at dates not specified) with intent to do grievous bodily harm, and sentenced; that at the time of the assaults he was a British subject, but had gone into rebellion, and was serving under a commandant in the forces of the late Orange Free State, and his defence was that he was acting under superior orders; that a point of law was reserved for the Supreme Court, namely, that the presiding judge had misdirected the jury that such orders constituted no defence in law, the prisoner being a rebel in arms, and, therefore, not entitled to take advantage of his own wrong, he not having been convicted or acquitted of high treason. The determination complained of was that there had been misdirection, and that it would have been competent for the accused to have pleaded that although he was a rebel he was a belligerent, privileged as such, his acts being those of ordinary warfare, or otherwise authorized by his superiors, and that such defence—which, however, had not been proved—would have been a good defence. The Court upheld the conviction, but a majority of the judges were of opinion that there had been a misdirection, and that, if it had been proved that the prisoner acted under the orders of his superior officer, that might have been a good defence to the charges against him.

Mackarness, for the petitioner, said that the petition was presented under s. 51 of His Majesty's Charter of Justice for the Colony dated May 4, 1832. A point of law had been reserved under s. 25 of the Cape Act V. of 1879 for the consideration of the Cape Court of Appeal, and on the point so reserved there had been a determination in favour of the prisoner and against the Attorney-General. The Attorney-General was therefore a person aggrieved by the determination, and entitled to petition for special leave to appeal to His Majesty in Council. He contended that there was no misdirection, and that it was of public importance that the doctrine laid down by the Supreme Court should not be allowed to stand. It involved the grave question of whether a rebel in arms was entitled to the rights of a belligerent. If their Lordships were of opinion that there was not strictly an appealable

J. C. 1904 REX v. LOUW. ATTORNEY-GENERAL FOR THE CAPE OF GOOD HOPE, *Ex parte.*

grievance within the Charter, it was competent for them to advise His Majesty to grant the leave to appeal under the general powers conferred by 3 & 4 Will. 4, c. 41 : *Morgan* v. *Leech.* (1)

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. Their Lordships are of opinion that this is not a case in which there should be leave to appeal.

Their Lordships are asked, in the exercise of their constitutional function, to advise His Majesty, under the terms of s. 51 of the Charter of Justice for the Colony, to admit an appeal from a "judgment or determination" of the Supreme Court with a view to the same being reversed, corrected, or varied. There has, however, been no "judgment or determination" in this case which can be, or which indeed is sought to be, either reversed, corrected, or varied. It is admitted by the petitioner that the judgment of the Supreme Court is to stand, and the object of the petition is to have an abstract point of law which did not arise in the case, and never ought to have been reserved at all, determined now by way of appeal. It would be extremely inconvenient, and wholly unprecedented, to pick out of a trial some observation of the learned judge and to ask to have an appeal upon it, although the facts at the trial and the determination of the trial did not raise the question at all.

Their Lordships will, therefore, humbly advise His Majesty that the petition ought to be dismissed.

Solicitors for petitioner: *Wilson, Bristows & Carpmael.*

(1) (1841) 3 Moo. P. C. 368, at pp. 374, 375.

[PRIVY COUNCIL.]

THE NEW TRINIDAD LAKE ASPHALT COMPANY, LIMITED . . . . . } PLAINTIFFS;

AND

THE ATTORNEY-GENERAL . . . . DEFENDANT.

AND CROSS-APPEAL.

J. C.*
1904
April 29;
May 3;
June 8.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Law of Trinidad and Tobago—Deed of Concession—Construction of Covenant —Lands in possession of the Crown.

A restrictive covenant by the Crown contained in its deed of concession affected certain lands situate within three miles of the subject of concession "which now are, or at any time during the said term or terms shall come into, the possession of Her Majesty."

In an action by the appellants for injunction and damages in respect of a breach of the said covenant by the Government:—

Held, that on its true construction it related only to lands in the actual possession, and did not include lands which were merely subject to the control, of the Crown, irrespective of the Crown having done anything with respect to the use or occupation of them.

CROSS-APPEALS, the first being from a decree of the Appeal Court (March 25, 1902) affirming an order of Baynes J. (June 3, 1901); the cross-appeal being by special leave from an order of the Full Court (Dec. 4, 1900) holding before trial of the action that the suit lay against the respondent as representing the Crown.

The action was in respect of breaches of a covenant contained in a deed of concession dated July 12, 1888, made between the late Queen on the one part and Previté and others of the other part. The appellants are assignees of the deed; the effect of which is stated in their Lordships' judgment.

The appellants contended that a parcel of land known as lot 68, and situate within three miles of the Pitch Lake, on

* *Present:* THE LORD CHANCELLOR, LORD LINDLEY, LORD KINROSS, and SIR ARTHUR WILSON.

J. C. 1904 NEW TRINIDAD LAKE ASPHALT COMPANY v. ATTORNEY-GENERAL.

which asphalt had been dug without the consent of the concessionaires, was at material times in the possession of Her Majesty within the meaning of the deed. The Attorney-General demurred that no action lay against him, and that no petition of right or analogous procedure was available to the appellants in that Court. He also traversed the appellants' allegations of fact, and denied that lot 68 had at any material time been in the possession of the Crown.

The Full Court held that the Legislature had recognised a right to sue the Government, and that a right so recognised and regulated had become incorporated in the law of the Colony.

Baynes J. at the trial held that the true construction of the deed was that lands "in possession of the Crown" meant lands in its actual possession, and excluded lands which the Crown had leased, and lands to which the Crown had a right of re-entry though in fact persons having no title were in occupation. That being so, he decided on the evidence that the Crown was not in possession of lot 68 in 1888. As to subsequent action in 1897 of the Government in stopping digging, he was inclined to regard it as an active assertion of ownership by the Crown such as to justify the Government in maintaining that it had resumed possession, but he refused to attach importance to it in view of the fact that the Government eventually declined to establish their title to the land. The Appeal Court held that the appellant company's evidence had established a primâ facie case that the Crown in 1897 entered into possession of lot 68; and ordered a new trial.

On the new trial Baynes J. again dismissed the action with costs. The Appeal Court was divided in opinion. The majority agreed with Baynes J. that the lands affected by the covenant were those in the actual possession of the Crown. Anderson C.J. held that the covenant applied to Crown lands of which the Government had control, and the legal right to deal with; thus excluding only lands which were leased.

Haldane, K.C., and *R. A. Wright*, for the appellants, contended that a suit such as this lay in the Colony against the

Government. By the rules and orders it is properly brought against the Attorney-General. By the Judicature Ordinance (No. 28 of 1879) provision is made for suits against the Crown. Sects. 40 and 42 incorporate the Rules of Court contained in the schedule. Order LX. provides for suits against the Government. New rules were made in 1898, and Order LXVIII. is verbally the same as the scheduled Order LX. They referred to *Hettihewage Siman Appu* v. *Queen's Advocate* (1); *Windsor and Annapolis Ry. Co.* v. *Reg.* (2) They further contended that by the true construction of the deed "lands in possession of the Crown" meant lands the title to which is in the Crown, and which the Crown is entitled to enter upon and deal with. Lot 68 was shewn to be unalienated Crown land. No adverse title thereto had been created, and it had been at all material times in the possession of the Crown.

Sir R. Finlay, *A.-G.*, *Sutton*, and *G. Lawrence*, for the respondent, were not heard.

1904
June 8.

The judgment of their Lordships was delivered by

LORD KINROSS. The question in this case is whether the appellants, the New Trinidad Lake Asphalt Company, Limited, have established certain breaches which they allege, on the part of the Crown, of a covenant contained in a deed of concession made on July 12, 1888, between Her late Majesty Queen Victoria of the one part, and Joseph Weedon Previté, Henry Alfred Greig, and the New York and Trinidad Asphalt Company of the other part. The appellants are assignees of the deed of concession.

By that deed it was stipulated that the concessionaires should, for considerations stated in it, have exclusive liberty to dig, work, search for, and win all pitch, asphaltum, oil, petroleum, coal, anthracite rock, and other substances, from a parcel of land known as the Pitch Lake in the island of Trinidad. The grant was for a term of fourteen years from February 1, 1888, and its duration was afterwards extended to a period of forty-two years from February 1, 1888. The deed of concession further provided, inter alia, that "so long as the

(1) (1884) 9 App. Cas. 571. (2) (1886) 11 App. Cas. 607.

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licences, powers, and privileges hereby granted shall continue in force by virtue of these presents, or by virtue of any renewal granted pursuant to these presents, no asphalt, pitch, or other asphaltic or bituminous substance shall be won or carried away for export or otherwise, by Her Majesty, her heirs or successors" (except for certain purposes of the Executive Government of the island), "or by any other person, for any purpose whatsoever, from any lands situate within three miles of the said parcel of land known as the Pitch Lake, which now are, or at any time during the said term or terms shall come into, the possession of Her Majesty, without the previous consent in writing of the concessionaires."

The appellants maintain that a parcel of land, known as lot 68, situated within three miles of the Pitch Lake, and on which asphalt had been dug without the consent of the concessionaires, was at material times in the possession of Her late Majesty, within the meaning of the deed of concession.

The Pitch Lake is in the ward of La Brea; it is upwards of 114 acres in extent, and it is about 100 feet above the level of the sea. Between it and the sea there is a road about a mile long known as the Pitch Lake Road. Lot 68 is not marked eo nomine on any of the plans produced, but the ground so designated by the appellants lies to the east of the Pitch Lake Road and to the east of the parcel marked as the Rest House. Part of the land comprised in lot 68 seems to have been sold to Montout Louis, but there is little reliable information as to the particulars of the different lots of ground in the locality. Montout Louis is stated to have left Trinidad in 1879, and Athanase King claimed the land as having purchased it from him. King, however, appears to have failed to prove a valid transfer from Montout. In May, 1897, a man named Rogers was convicted of digging on Crown lands without a licence, contrary to the Ordinance (No. 4 of 1889) and was fined. He appealed against this conviction, but it was upheld by the Court of Appeal. The lessees of Montout's land then stopped digging on the part of lot 68 marked out as Crown land, and desired the Government to say whether they claimed that portion of lot 68 as Crown land or not. Various negotiations

took place in regard to this land, which it is unnecessary to narrate, and in the result, on October 11, 1899, the Governor gave his consent, under the rules and orders in force in the locality, to the bringing of a suit by the appellants against the Attorney-General for the determination of the claims of the appellants against the Government in the matter of digging of asphalt from the lands known as lot 68. A suit was accordingly brought by the appellants in October, 1899, in which they alleged that there had been such digging on lot 68, which was within three miles of the Pitch Lake, without their consent, and claimed a declaration that lot 68 was in the possession of the Government at the date of the deed of concession in their favour, or, alternatively, that it came into the possession of the Government during 1896–97 and 1898 by reason of the marking out of the lot, and the prohibition of digging upon it, at that time. An injunction and damages were also craved in respect of the alleged breach of covenant on the part of the Government.

The Attorney-General by his statement of defence, dated December 15, 1899, demurred to the claim on the ground that no action lay against him in respect of any alleged breach of contract committed by the Governor of the Colony in the exercise of any executive discretion, and that no petition of right or analogous procedure was available to the appellants in that Court, as also that the rules and orders merely regulated matters of procedure, or that if they purported to confer substantive rights they were ultra vires and invalid. The Attorney-General further traversed the allegations of fact contained in the statement of complaint, and denied that lot 68 had, at any material time, been in or had come into the possession of the Crown.

By an order dated March 19, 1900, the questions of law raised in the defence were put down for preliminary hearing before the Full Court of Trinidad and Tobago, and on December 4, 1900, that Court, composed of Sir W. J. Anderson C.J. and Baynes J., held that a right to sue the Government existed, and that this right, recognised and regulated for more than twenty-one years previously, had become part of

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the law of the Colony. Against this decision the Attorney-General obtained special leave from His Majesty to cross-appeal; but in the circumstances the cross-appeal was not argued.

The issues of fact raised between the parties were afterwards tried and evidence led by the appellants, and on March 11, 1901, Baynes J. gave judgment in favour of the Attorney-General, dismissing the action with costs. He decided that, according to the true intention of the parties to the deed of concession, lands "in the possession of Her Majesty" meant lands in the actual possession of the Crown, and did not include Crown lands which the Crown had granted on lease, or Crown lands to which the Crown had a right to re-enter, although in fact persons having no right were in occupation of them. He, therefore, held, on the evidence, that the Crown was not in possession of lot 68 in 1888, and he also rejected another contention maintained by the appellants.

The appellants appealed against this judgment to the Appeal Court, and that Court, by an order dated April 16, 1901, directed that the judgment of Baynes J. should be set aside and a new trial held. The Court considered that the evidence of the appellants had established a primâ facie case that the Crown had in 1897 entered into possession of lot 68. The new trial took place before Baynes J. in April, 1901, and on June 3 he gave judgment in the new trial, again deciding in favour of the Attorney-General, and dismissing the action with costs, holding that the deed of concession related to lands in the actual possession of the Crown, and that lot 68 was not in 1888 in possession of the Crown, as also that there was not evidence to shew in whom the legal estate was then vested. He held that the conviction of Rogers above mentioned was not evidence of possession by the Crown.

An appeal was taken against this judgment to the Appeal Court and the case was fully heard before that Court, consisting of Sir W. J. Anderson C.J., Baynes J., and Routledge J., with the result that these learned judges differed in opinion, the Chief Justice holding that, upon a true construction of the deed of concession, "land in the possession of the Crown"

meant land of which the Crown had the control and the legal right to deal with, excluding Crown lands which had been granted in, and which were held under, lease. He expressed the view that any other construction would be unreasonable in a Colony where so small a part of the Crown lands was in the actual occupation of the Crown, while the deed of concession presupposed Crown lands subject to the control of the Crown, but in the occupation de facto of some person without legal right who dug pitch. He considered that the evidence shewed that lot 68 was Crown land, and that every attempt to prove its alienation had failed, and that consequently it was in the possession of the Crown. Baynes J. adhered to the opinion on this subject which he had formerly expressed, and Routledge J. agreed with him for similar reasons, and a decree was accordingly made on March 25, 1902, in accordance with the views of the majority of the Court.

The question upon which their Lordships have now to advise His Majesty is whether the view of the Chief Justice or that of Baynes J. and Routledge J. is right, and their Lordships are of opinion that the view expressed by the two last-named judges is the correct one. Possession is primâ facie a question of fact, and a person may be proprietor of land without being in possession of it. The view of the Chief Justice appears to be that all land belonging by title or right to the Crown falls within the description in the concession, whether the Crown has or has not done anything with respect to the use or occupation of it. If this had been intended to be the meaning of the language of the concession upon which the question arises, it is difficult to suppose that it would not have been unequivocally expressed. The appellants maintain that the description "lands in possession of the Crown" means lands the right or title to which is in the Crown, although the Crown may never have entered into possession of or interfered with them, either by itself or by any one having its authority. This view appears to their Lordships to substitute a different test or criterion for that which is expressed in the deed of concession, namely, to take the test or criterion of proprietary right or title instead of

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that of possession. It appears that both before and after the date of the concession, and without the authority of the concessionaires, some persons dug pitch in lot 68, but this was never done with the permission or consent of the Governor. The view taken by both Baynes J. and Routledge J. is that the expression "which now are or at any time . . . . shall come into the possession of Her Majesty" means land in the actual possession of the Crown or its officers, and the concessionaires were unable to prove that lot 68 was Crown land in this sense. But even if the construction put by the Chief Justice upon the word "possession," namely, that it is equivalent to control or right to control, were adopted, the case would fail, because it is not proved that lot 68 was ever in the control of the Government. Their Lordships do not think that the conviction of Rogers had the effect of bringing the land into the possession of the Crown in any sense material to the present question. It appears that on the occasion of the prosecution of Rogers the ownership of lot No. 68 did not come into question, and that no evidence was given on the part of the prosecution that it was the property, or in the possession, of the Crown.

Their Lordships will humbly advise His Majesty to dismiss the principal appeal, and affirm the decree of the Appeal Court of March 25, 1902, as also to make no order on the cross-appeal from the decree of December 4, 1900. The appellants will pay the costs of the principal appeal. As to the cross-appeal, their Lordships have already directed the Attorney-General to pay the appellants' costs of his petition for special leave to cross-appeal, and these costs will be set off against the costs of the principal appeal. With regard to any additional costs which may have been incurred by reason of the cross-appeal, their Lordships direct the parties to bear such costs themselves.

Solicitors for appellants: *Ashurst, Morris, Crisp & Co.*
Solicitors for respondent: *Sutton, Ommanney & Rendall.*

[PRIVY COUNCIL.]

CITIZENS' LIFE ASSURANCE COMPANY, LIMITED . . . . . } DEFENDANTS;

AND

BROWN . . . . . PLAINTIFF.

J. C.* 1904 April 20; May 6.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Libel by Servant of Corporation—Liability of Company for Malicious Libel.

A corporation cannot be held to be incapable of malice so as to be relieved of liability for malicious libel when published by its servant acting in the course of his employment.

Although the servant may have had no actual authority, express or implied, to write the libel complained of, containing statements against the plaintiff which he knew to be untrue, if he did so in the course of an employment which is authorized, the corporation is liable.

Barwick v. *English Joint Stock Bank*, (1867) L. R. 2 Ex. 259, approved.

APPEAL from an order of the Full Court (Oct. 31, 1902) refusing a rule nisi against the plaintiff to set aside a verdict obtained by him for 650*l.* damages, and to enter a non-suit or verdict for the defendants, or for a new trial.

The damages obtained were for a libel contained in a circular sent to several persons insured in the appellant company by Fitzpatrick, a superintendent in their employ, or their agents. No plea of justification was filed, and no evidence given in support of the truth of the libel complained of.

On April 26, 1901, the respondent obtained a verdict. On August 12 in the same year a new trial was ordered, when the respondent again obtained a verdict. On May 22, 1902, a third trial was ordered, when the said verdict for 650*l.* was given. The said rule nisi was applied for on the grounds (inter alia)—(1.) that the jury had found against evidence that Fitzpatrick in publishing the libel was acting within the scope and in the course of his employment; (2.) that the judge

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD LINDLEY, and SIR ARTHUR WILSON.

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had directed that malice in Fitzpatrick was evidence of malice in the appellants.

The Full Court held that there was evidence on which the jury could find that the libel was published by Fitzpatrick in the course of his employment, that such publication would render the appellants, his principals, liable though they did not authorize the particular act, because he was put by the appellants in a position in which he was authorized to write a letter such as the circular complained of in endeavouring to save the business of the appellants, and that there was evidence of malice which could be imputed to the appellant company.

Asquith, *K.C.*, and *Frank Russell*, for the appellants, contended that this decision was wrong and that judgment should be entered for them, for they were not shewn to have had any knowledge of the libel or its publication, or to have authorized it in any way. The publication was made by Fitzpatrick on his own initiative and in breach of his duty to the appellants, and was outside the course or scope of his employment. The judge held rightly that the occasion of the publication was privileged, and there was no evidence of malice in Fitzpatrick. Even if Fitzpatrick's malice was proved, that would be no evidence of malice in the appellants; for malice cannot be imputed to a corporation: see *Nevill* v. *Fine Arts and General Assurance Co.* (1); *Abrath* v. *North Eastern Ry. Co.* (2); *Edwards* v. *Midland Ry. Co.* (3); *Cornford* v. *Carlton Bank.* (4)

H. Drysdale Woodcock, for the respondent, was not heard.

1904
May 6.

The judgment of their Lordships was delivered by

LORD LINDLEY. The question raised by this appeal is whether a limited company is responsible for a libel published by one of its officers. The action has been tried three times. The plaintiff obtained a verdict and judgment every time, with damages which have been every time increased. Counsel for

(1) [1895] 2 Q. B. 156; [1897] A. C. 68.
(2) (1886) 11 App. Cas. 247.
(3) (1880) 6 Q. B. D. 287.
(4) [1899] 1 Q. B. 392.

the company feel that it would be useless to send the case back for another trial, and they therefore ask that the last verdict and judgment should be set aside and judgment entered for the company.

The facts are shortly as follows :—

The appellants are an assurance company incorporated with limited liability and carrying on business in New South Wales. From January, 1900, until June, 1900, the respondent Brown (the plaintiff in the action) was in the service of the company as an insurance agent at Tamworth. Brown was introduced to the company by Fitzpatrick, who was employed by the company as a superintendent of agencies under the terms of an agreement dated June 12, 1899. His duties will be referred to presently. Shortly after leaving the employment of the company, namely, in the month of July, Brown entered the service of a rival company called the Standard Life Association, and while in the service of such company Brown visited divers of the policy-holders in the appellant company, and endeavoured to induce such policy-holders to leave the appellant company and to insure in the Standard Life Association, and for the purpose of bringing about such a result made statements derogatory to the appellant company. Fitzpatrick learned that such statements had been and were being made, and he published the libel complained of. It was a circular letter sent to several persons insured in the appellant company in answer to inquiries made by them. It was plainly defamatory. Some statements contained in it were not true, and Fitzpatrick knew they were not true. There was evidence of express malice on the part of Fitzpatrick. There is no note of the learned judge's summing-up, but the jury found a verdict for the plaintiff, gave him 650*l.* damages, and found that "Fitzpatrick was acting in publishing the libel within the scope of his employment and in the course of his employment." Judgment was accordingly entered for the plaintiff for this sum and costs; and the Supreme Court refused to set aside the verdict and enter judgment for the defendants, and refused to grant a new trial. Hence the present appeal.

Counsel for the appellants contended, first, that the verdict

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was wrong in finding that Fitzpatrick acted in publishing the libel within the scope and in the course of his employment; and, secondly, that even if he did, yet the malice with which he wrote it cannot be imputed to the company. In support of this proposition reliance was placed on the well-known judgment of the late Lord Bramwell in *Abrath* v. *North-Eastern Ry. Co.* (1)

It will be convenient to dispose of the second question first. There is no doubt that Lord Bramwell held strongly to his opinion that a corporation was incapable of malice or motive, and that an action for malicious prosecution could not be maintained against a company. Lord Cranworth in *Addie* v. *Western Bank of Scotland* (2) had expressed a similar opinion as to the liability of corporations for frauds. But these opinions have not prevailed, and their Lordships are not prepared to give effect to them. If it is once granted that corporations are for civil purposes to be regarded as persons, i.e., as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals. These doctrines have been so applied in a great variety of cases, in questions arising out of contract, and in questions arising out of torts and frauds; and to apply them to one class of libels and to deny their application to another class of libels on the ground that malice cannot be imputed to a body corporate appears to their Lordships to be contrary to sound legal principles. To talk about imputing malice to corporations appears to their Lordships to introduce metaphysical subtleties which are needless and fallacious. Their Lordships concur with the view of the Acting Chief Justice in this case that, if Fitzpatrick published the libel complained of in the course of his employment, the company are liable for it on ordinary principles of agency. Fitzpatrick's letter, although published on a privileged occasion, was not itself privileged; and not being privileged the letter must be treated as any other libel written and published by an officer of the company.

(1) 11 App. Cas. 247, at p. 250. (2) (1867) L. R. 1 H. L., Sc. 145.

There remains, however, the important question whether there was evidence on which the jury could properly find that the publication of the letter was within the scope of Fitzpatrick's authority or, what is the same thing, within the scope of his employment. He was engaged by a written agreement; he was a superintendent; he was to act under instructions given to him by properly authorized officers and in accordance with the rules and regulations of the company. He was to devote his whole time to furthering the company's business. He was to receive and pay money, keep proper accounts, and to supervise various agencies under him. He was to be paid a salary of 5*l.* a week and a commission on policies procured by him. The written agreement did not state more precisely what his duties were. Witnesses were called to throw further light upon the subject. Mr. Eedy, the general secretary of the company, said that if policy-holders wanted to know why the company did not prosecute Brown for his statements about the company, Fitzpatrick should have communicated that matter to the head office before taking action. "It would have been his duty." Another witness said his duty was to appoint and look after agents, and "to stand as an intermediate between the assured and the office. His authority is to secure business and save business and to visit policy-holders whose policies have lapsed or are likely to lapse. In the district itself there is no one above him." It is clear that the scope of Fitzpatrick's authority and employment was wide and by no means clearly defined. In considering the scope of his authority and employment their Lordships agree with the Acting Chief Justice in thinking that the jury were entitled to act on their own knowledge of Colonial business and habits. They were entitled to consider the necessities of the case arising from the size and nature of the district placed under Fitzpatrick's supervision, and what would naturally be done in the Colony by a person in his position. He had no actual authority, express or implied, to write libels nor to do anything legally wrong; but it is not necessary that he should have had any such authority in order to render the company liable for his acts. The law upon this subject cannot be better expressed than it was by the Acting Chief Justice in

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this case. He said: "although the particular act which gives the cause of action may not be authorized, still if the act is done in the course of employment which is authorized, then the master is liable for the act of his servant." This doctrine has been approved and acted upon by this Board (in *Mackay* v. *Commercial Bank of New Brunswick* (1); *Swire* v. *Francis* (2)), and the doctrine is as applicable to incorporated companies as to individuals. All doubt on this question was removed by the decision of the Court of Exchequer Chamber in *Barwick* v. *English Joint Stock Bank* (3), which is the leading case on the subject. It was distinctly approved by Lord Selborne in the House of Lords in *Houldsworth* v. *City of Glasgow Bank* (4), and has been followed in numerous other cases.

Such being the evidence, their Lordships cannot judicially hold that there was no evidence to warrant the jury in finding that it was within the scope of Fitzpatrick's authority and employment to write to policy-holders in order to counteract the mischief which Brown was doing to the business of the company; and although Fitzpatrick went too far and made charges against Brown which he knew were not true, their Lordships are of opinion that the company are legally responsible for what he wrote.

As regards the verdict being against the weight of evidence, it must be borne in mind that Simpson J., who tried the last action, was satisfied with the verdict, and he reports that the judges who tried the two previous actions were also satisfied with the verdicts given in them. Their Lordships see no reason for thinking the verdict wrong on the evidence adduced.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal, and the appellant company must pay the costs.

Solicitors for appellants: *Charles Russell & Co.*
Solicitor for respondent: *J. H. Galbraith.*

(1) (1874) L. R. 5 P. C. 394.
(2) (1877) 3 App. Cas. 106.
(3) L. R. 2 Ex. 259.
(4) (1880) 5 App. Cas. at p. 326.

[PRIVY COUNCIL.]

McDONALD . . . . . DEFENDANT;

AND

BELCHER AND OTHERS . . . . . PLAINTIFFS.

J. C.*
1904
April 27, 28.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Final Judgment—Yukon Territorial Act, 1899, *s.* 8—*Practice—Omission in Petition for Special Leave—Costs.*

In an action by executors against the appellant to recover certain sums of money due to their estate, the judge of the Territorial Court, at the request of the plaintiffs, selected one of the items, and adjudicated on the evidence taken that the action in respect thereof be dismissed:—

Held, that this was, within the meaning of the Yukon Territorial Act, 1899, s. 8, a final judgment in respect thereof, notwithstanding that the remaining items in suit were referred and the costs were reserved. No appeal therefrom to the British Columbia Court lay after the expiration of twenty days.

Special leave having been granted from a decree of the Supreme Court of Canada on a petition stating that the construction of the said statute was a matter of general public importance, without stating that it had been repealed:—

Held, that as the omission was immaterial and bonâ fide the appellant should not be deprived of his costs.

APPEAL by special leave from a decree of the Supreme Court (May 5, 1903) reversing a decree of the Supreme Court of British Columbia (Nov. 17, 1902), which had affirmed a decree of the Territorial Court of the Yukon Territory (one of the North-West territories of Canada).

The Supreme Court of Canada ordered a new trial of the action, with leave to the parties to amend their pleadings.

The action was brought by the respondents as executors of one Alexander Calder, deceased, for an account in connection with various mining transactions in which the said Alexander Calder and the appellant were jointly interested; and for payment of (1.) a sum of $50,000 with interest thereon (payable in gold dust at $16 per ounce) due on a note or document dated September 19, 1898, whereby the appellant

* *Present:* THE LORD CHANCELLOR, LORD LINDLEY, LORD KINROSS, and SIR ARTHUR WILSON.

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promised to pay to Calder $100,000 on demand in gold dust at $16.00 per ounce; and (2.) a sum of $8,798.80 (payable as aforesaid) being the unpaid balance of a sum of $26,222 or thereabouts, due by the appellant to Calder in respect of one-half of the "clean-up" for 1899 on a mining claim known as No. 27 Eldorado. The action also included claims, afterwards abandoned, against the appellant on certain other notes.

On May 23, 1901, Dugas J. dismissed the action so far as it related to the document of September 19, 1898, and ordered a reference to inquire into the state of accounts between Calder and the appellant without reference to the said document. On September 25 in the same year he confirmed the referee's report, and dismissed the action with costs except in regard to certain specified particulars.

The Supreme Court of British Columbia decided that there had been a final dismissal of the action in respect of the claim for $50,000; and that this judgment was not appealable owing to delay beyond the twenty days allowed for giving notice of appeal. The rest of the appeal was dismissed on the merits. The Supreme Court, without considering the question of jurisdiction to entertain the appeal, reversed the judgments of the lower Courts and ordered a new trial. The legislation upon appeals from the Territorial Court of Yukon to the British Columbia Court and thence to the Supreme Court of Canada is contained in ss. 7, 8, and 13 of c. 11 of the statutes of Canada for 1899.

Blake, K.C., and *Auguste Noel*, for the appellant.

Sir C. Tupper, K.C., and *F. Russell*, for the respondents.

Sir C. Tupper objected that special leave to appeal had been erroneously granted on a petition which stated the construction of the above statute was a matter of general public importance, but omitted to state that the same had at the time of the application been repealed. The appeal should be dismissed on that ground alone: see *Lyall* v. *Jardine* (1); *Wilson* v. *Callender* (2); *Sibnarain Ghose* v. *Hallodhur Doss.* (3)

(1) (1870) L. R. 3 P. C. 318, 326. (2) (1855) 9 Moo. P. C. 100.
(3) (1854) 9 Moo. P. C. 354.

Blake, K.C., contended that the omission was immaterial, since the point as to jurisdiction arose outside the provisions of the Act. It was not suggested to be malâ fide, and ought not to affect costs. On the merits of the appeal he contended that the judgment of the Territorial Judge of May 23, 1901, as to the claim for $50,000 was final, and had become res judicata, and was conclusive and unappealable at the date of the appeal to the Court of British Columbia. That Court in consequence had no jurisdiction to entertain any appeal therefrom, nor had the Supreme Court of Canada any jurisdiction to do so. Upon the question of the finality of that judgment he submitted that it went to the root of the claim in whatever form it was presented, whether as a note, an account stated, or otherwise. Reference was made to *Ex parte Moore* (1); *In re Alexander* (2); *International Financial Society* v. *Moscow Gas Co.* (3); *Lowe* v. *Lowe* (4); *The Brenhilda* v. *British India Steam Navigation Co.* (5); *Standard Discount Co.* v. *La Grange* (6); *Shubrook* v. *Tufnell* (7); *Collins* v. *Vestry of Paddington* (8); *Blakey* v. *Latham* (9); *Bozson* v. *Altrincham Urban Council.* (10)

Sir C. Tupper, K.C., and *Frank Russell*, for the respondents, contended that the appeal to the British Court of Columbia was properly brought within the prescribed time. The so-called judgment of May 23, 1901, was not a final judgment; it was merely a memorandum or note of the opinion or ruling of the judge, made during the trial and before the final judgment, which was not made till September 25, 1901, after the referee's report. This memorandum reserved costs, and referred the other items of claim. There were three causes of action under the same writ, and it was not a final judgment when the judge, at the request of parties, disposed of one of them by an interlocutory order and proceeded with the trial of the remainder, making at a later date a final and appealable judgment on all the causes of action at the same time. At the best

(1) (1885) 14 Q. B. D. 627.
(2) [1892] 1 Q. B. 216.
(3) (1877) 7 Ch. D. 241, 247.
(4) (1879) 10 Ch. D. 432.
(5) (1881) L. R. 8 Ind. Ap. 159, 162.
(6) (1877) 3 C. P. D. 67, 71.
(7) (1882) 9 Q. B. D. 621.
(8) (1880) 5 Q. B. D. 368.
(9) (1889) 43 Ch. D. 23, 25.
(10) [1903] 1 K. B. 547.

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the memorandum was merely an interim order or expression of opinion, and not a judgment; and was so understood by the parties. They referred to *Macfarland* v. *Brown* (1); *Cremetti* v. *Crom* (2); *Bozson* v. *Altrincham Urban Council* (3); *International Financial Society* v. *Moscow Gas Co.* (4); *Lowe* v. *Lowe* (5); *Pheysey* v. *Pheysey*. (6)

Blake, K.C., replied.

1904 April 28.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. Notwithstanding the time occupied by this case in argument, the questions for decision are very narrow indeed. The action, which was commenced in the Territorial Court of the Yukon Territory, was brought under circumstances similar to those which would arise in this country if a plaintiff were to bring a number of actions comprehended in one writ.

During the argument a great many observations were made which some half-century ago would have been very appropriate, and probably conclusive, but which are wholly inapplicable to the system of jurisprudence which has been established since that period. Formerly there were forms of action outside which the plaintiff could not go. One record was one history of a particular litigation. Indeed, in earlier times, only one plea was admitted; and until the statute of Anne (the Law Amendment Act, 1705) a person was compelled to base his whole defence on one plea, and could not raise more than one. In like manner he had either to plead or to demur, and the judgment upon the plea, if issue was taken upon it, was conclusive against the person who was found to be in the wrong; and the judgment upon demurrer was conclusive, and would, in the strictest and most appropriate sense, be described as a final judgment. The so-called declaration, to which a person was confined, had to set out the cause of action, appropriately describe it, and, within very narrow limits indeed, bring it under a particular head of right. All that is

(1) (1902) 1 U. S. R. 239, 245.
(2) (1879) 4 Q. B. D. 225.
(3) [1903] 1 K. B. 547.
(4) 7 Ch. D. 241.
(5) 10 Ch. D. 432.
(6) (1879) 12 Ch. D. 305.

changed. It is clear that all those rules are now inappropriate, and that the learning and phraseology applicable to them have passed away. Rightly or wrongly, the Legislature has enacted —and the law in force in the Yukon Territory follows in terms the procedure of this country—that the statement of claim shall be a simple narrative of the facts upon which the plaintiff relies, and it is for the judge to direct the jury, if there be a jury, or to decide himself, if there be none, as to the nature of the legal liability which is disclosed, not upon appropriate legal averment, but upon the facts described in the statement of claim. It is necessary to bear these matters in mind in deciding the present case, because many of the observations made and some of the authorities quoted by counsel appear to rest upon the idea that, notwithstanding the fundamental changes made by the Legislature, the old legal procedure is still preserved.

In this case the respondents, the executors of one Calder, brought an action against the appellant claiming that certain sums of money were due from him to Calder's estate. There were several matters in dispute, and the statement of claim describes the mode in which they arose. The particular matter, however, upon which the case now before their Lordships depends (and it has been frankly admitted that, if that one particular matter is decided against the respondents, the appeal must succeed and that the other matters may be disregarded) is whether the question of an indebtedness by the defendant (the appellant) to the extent of $50,000 was or was not finally disposed of by the trial which took place before the Territorial Judge—that is to say, whether the language used by the learned judge in disposing of the matter constituted a final judgment of the Court. If the judgment was interlocutory, no appeal lay. If it was final, an appeal could only be brought within twenty days, whereas, in fact, no appeal was entered or notice given until a period of twenty-one days.

The question, therefore, is reduced to this: Was there, or was there not, a final judgment? The learned judge ordered, on May 23, 1901, that, "as to the alleged note or paper

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writing mentioned in paragraph 2 of plaintiffs' statement of claim," the plaintiffs' action be dismissed. On the language used by the learned judge some criticism might be passed as to whether, in giving a decision on one item of an account, it is appropriate to say that "the action thereupon is dismissed." The respondents contend that the language used might have misled them as to the amount of time in which they could appeal, because they did not understand that language to constitute a final judgment. The point in dispute is whether the judgment of the learned judge, who, by the request of the respondents themselves, took out one of the items of account and adjudicated upon that item, was a mere adjudication that an action on a promissory note would not lie, or was really a decision that the sum of money represented by that note was one which, according to his view of the evidence, was not due.

Their Lordships desire, in the first place, to observe that, if the decision were simply that the instrument relied on was sued on in its character as a promissory note, no other evidence than the document itself was required to enable the learned judge to give such a decision. But so far from confining himself to the document itself, the learned judge heard the evidence. Apart altogether from what he said afterwards, in September, 1901, it is impossible, if one looks at what was done and said at the time of the trial, to suppose but that the learned judge entered into the merits, and came to the conclusion that the $50,000 were not due. If confirmation of that view were wanted, it is only necessary to look at what occurred when the rest of the items in the account were referred to the clerk of the Court to determine whether or not any money was due from the defendant to the plaintiffs. In making his report, dated September 10, 1901, the referee says: "The claim for $50,000 having been dismissed, I take this as a starting point, and the only starting point that I can take from the evidence." The referee, therefore, understood what the learned judge had said; and if it was intended to contest his construction of the judgment of May 23, 1901, one would have expected the plaintiffs to make an application to the Court, and to urge that the referee had not understood the

judgment, and that the learned judge only intended to say that an action would not lie on a promissory note, whereas the referee to whom the rest of the account has been remitted had actually refused to enter into the question of the $50,000, on the ground that this money had been adjudicated upon, and that he had no right to enter into that part of the account. If that is what the plaintiffs thought at the time, and if they did not themselves understand the meaning of the learned judge, what would have been simpler than for them to apply to the Court, and to have the matter put right? They could have urged that all the learned judge meant was that an action would not lie upon this as a promissory note, because it was for gold dust, and not for money. But instead of doing this, they allowed the account to be taken, to the exclusion of the claim for $50,000. The referee does not use the phrase "promissory note." He speaks of "the claim for $50,000." He says in effect: "The claim for $50,000 having been decided against you, it is hardly necessary to proceed further to shew what everybody understood at the time to be that which the learned judge subsequently explained"; and their Lordships cannot admit that there was anything to prevent the learned judge from explaining what he had intended to decide, if there was any ambiguity in his language. However, the question whether there should be an appeal was, as Mr. Blake has pointed out on behalf of the appellant, decided by the parties themselves, and the notion of their having been misled, and having delayed this notice of appeal through a misunderstanding of the learned judge's judgment, is illusory, because they had actually decided to appeal, and an interlocutory order would have been unappealable. The account given of why they did not appeal in time—namely, that they could not give notice of appeal in twenty days—is a somewhat singular one, which is treated with great propriety by the Supreme Court of British Columbia.

In the result, their Lordships are of opinion that there was a final judgment in the Territorial Court as to the claim for $50,000, whether the costs were given at the time or followed in due course of law. If there was a final judgment the

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present appeal does not lie; for it is impossible to get out of the express language of the Canadian statute (the Yukon Territory Act, 1899, s. 8). This is a most important matter for one of the litigants, at any rate. For the moment the time for appealing has passed, the litigation is at an end, and it would be very disastrous if, under such circumstances, it could be extended contrary to statute. As pointed out in a case cited before their Lordships—*International Financial Society* v. *City of Moscow Gas Co.* (1)—the law in such cases confers a most important right on one of the litigants by ordering that there shall be an end, finally, of the litigation between the parties.

The result is that an appeal did not lie to the British Columbian Court from the judgment of the Territorial Court of May 23, 1901, as regarded the claim for $50,000, and the appeal to the Supreme Court of Canada was incompetent.

In these circumstances it is not necessary, and, indeed, it would not be proper, to discuss the merits of the question which have been decided by the only tribunal competent to decide them and from whose decision there is now no appeal. Their Lordships will, therefore, humbly advise His Majesty to allow the appeal, to reverse the judgment of the Supreme Court of Canada with costs, and to restore the judgment of the Supreme Court of British Columbia of November 19, 1902, with a declaration that the judgment of the Territorial Court of May 23, 1901, was final so far as it "ordered and adjudged as to the alleged note or paper writing mentioned in paragraph 2 of plaintiffs' statement of claim that the plaintiffs' action thereupon be and the same is hereby dismissed."

A preliminary objection was taken by the respondents that the particular statute in question, the construction of which was stated to be a matter of general public importance justifying an application to His Majesty in Council for special leave to appeal, had at the time of such application been repealed, and that the appellant ought to have brought that fact before their Lordships at the time when his application was made. It has not been suggested, and very properly not suggested,

(1) 7 Ch. D. 241, at p. 247.

that there was any lack of bona fides on the part of the appellant. At the same time, the fact ought to have been mentioned. Their Lordships do not, however, consider the point to be such as to affect the question of costs in this case, inasmuch as the real question arising on this appeal—namely, whether or not an order made under the circumstances stated was a final judgment within the meaning of the statute—is as important now as it was then. Their Lordships have already expressed their opinion that it was a final judgment; and it is only necessary to add that some of the confusion and difficulties that have arisen are due to the acts of the respondents themselves. If the causes of action had been allowed to take their ordinary course, and the whole matter had been disposed of by the learned judge in the Territorial Court, no question could possibly have arisen, and the learned judge would probably have disposed of the costs, and have used language not open to ambiguity in disposing of the whole litigation. But at the express desire of the respondents themselves he took out of the account the particular item of the claim for $50,000, and gave judgment upon that particular item. The compliance with this request of the respondents has probably given rise to all this trouble. But the question whether the order under consideration was or was not a final judgment is as important to-day as it was before the statute referred to was repealed. The result is that their Lordships find no sufficient reason to deprive the appellant of his ordinary right to the costs of the appeal.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondents: *Charles Russell & Co.*

[PRIVY COUNCIL.]

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1904
June 2, 22.

THE AFRICAN GOLD RECOVERY COMPANY, LIMITED . . . . . } APPELLANTS;

AND

HAY . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE TRANSVAAL.

Law of the Transvaal—Proclamation No. 14 *of* 1902, *s.* 16—*Final Decree of High Court of the Republic—Jurisdiction in Appeal—Transvaal Patent Act, No.* 6 *of* 1887, *ss.* 29–31—*Construction.*

The Supreme Court of the Transvaal, constituted by the Transvaal Proclamation No. 14 of 1902, has no jurisdiction to entertain an appeal from a decision of the High Court of the Transvaal Republic which before the war was final; for s. 16 of the proclamation gives no right of appeal where none existed before :—

Held, also, that the High Court had power under the Transvaal Patent Act, No. 6 of 1887, ss. 29–31, to cancel a patent in an action to which the Attorney-General was not a party.

APPEAL from an order of the Supreme Court of the Transvaal (Oct. 30, 1892) dismissing the appellants' petition filed in the case of *Hay* v. *African Gold Recovery Co.* The subject-matter of dispute in the action was a certain process (known as the McArthur Forest Cyanide Process) having for its object the extraction of gold and silver from ores and other compounds. Two patents had been granted to Forest and others, or their assignees, in respect thereof in the United Kingdom, and two also in the South African Republic. One of the English patents, identical with No. 47 of the Republic, had been declared invalid by the Courts in England; the specification was amended, but its validity as amended had not been adjudicated upon. The South African patents remained in their original form at the time of Hay's action.

In 1894 Hay sued in the High Court of the Transvaal Republic to cancel, under art. 29 of Law No. 6 of 1887, the two South

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African patents as having been obtained illegally. In 1895 the defendants applied to the High Court for leave to amend the specification and claims of patent No. 47, which application was refused. On November 4, 1896, the High Court ordered that the patents be cancelled.

In 1902 the appellants applied for an extension of the term of patent No. 47. The application was refused on the ground that the patent had been cancelled by the order of the late High Court of the South African Republic. On September 18, 1902, the appellants petitioned the Supreme Court in Hay's said action against them, seeking to reopen the judgment of November 4, 1896. On October 30, 1902, an order was made dismissing the application with costs, the judges of the Supreme Court being of opinion that the Supreme Court had no jurisdiction to rehear a matter on which the late High Court had adjudicated, and that the action was not at the date of the proclamation (No. 14 of 1902) an action or matter depending in the High Court of the late Republic.

Asquith, K.C., and *J. W. Gordon*, for the appellants, contended that this order should be reversed. They referred to the Proclamation No. 14 of 1902, especially s. 16. The Supreme Court has cognizance of all pleas and jurisdiction in all civil cases which have arisen within the Transvaal whether before or after the annexation. Such jurisdiction includes jurisdiction in causes and proceedings arising whether wholly or in part out of miscarriage of justice in proceedings had in the late High Court. They contended that the judgment by that Court in Hay's action was wrong and occasioned a miscarriage of justice, and ought to be set aside. The record of the judgment is now in the custody of the Supreme Court, is incorrect and unauthorized, and ought to be amended. The Supreme Court has jurisdiction to grant and the appellants are entitled to leave to apply at the Patent Office of the Transvaal for leave to amend the specification of patent No. 47. By virtue of the Proclamation No. 14 of 1902 this action has passed into the jurisdiction of the Supreme Court as an action depending in the late High Court. The

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judgment of November 4, 1896, was erroneous because the Republican Government being a party to the grant of the patent was a necessary party to a suit for its cancellation, but was not represented therein. Besides, the relief asked by Hay was not cancellation or any relief in the nature of a judgment in rem, but was a declaration of invalidity as between the parties which did not affect the existence of the patent or its validity as between other parties. The Court had no jurisdiction to go beyond the prayer of the plaint.

Neville, K.C., Haldane, K.C., and *Molloy*, for the respondent, were not heard.

1904
June 22.

The judgment of their Lordships was delivered by

LORD LINDLEY. The Supreme Court of the Transvaal has decided that it has no jurisdiction to entertain an appeal from the decision of the High Court of the Transvaal Republic pronounced in November, 1896.

The appellants maintain that the Supreme Court has such jurisdiction, and ought to exercise it and decide their appeal on the merits. This is the question which their Lordships have to determine.

It is common ground that by the law of the Transvaal before the war the decision of the High Court of the Republic was final. There was no appeal from its decision to any higher Court in South Africa, nor to Her Majesty in Council. The appellants, therefore, have to shew some statute or ordinance passed since the annexation of the Transvaal, and conferring a right of appeal from the decision of such Court to some Court of the new Colony. The only authoritative document which bears upon the question is the Proclamation (Transvaal) No. 14 of 1902, under which the existing Supreme Court is constituted. The important section is s. 16, which says: "The said Court shall have cognizance of all pleas and jurisdiction in all civil causes and proceedings arising or which shall have arisen within the said Colony, or which shall have arisen in the Transvaal prior to the annexation thereof."

There is another section (s. 43) relating to pending proceedings, but it has no application to this case. It appears

to their Lordships, as it did to the Supreme Court of the Transvaal, that the language of s. 16 creates no right of appeal; it gives no right of appeal where none existed before; consequently the appellants' contention cannot be sustained.

It is unnecessary to consider whether the Roman-Dutch law on restitutio in integrum makes any exception, as it has no application to the facts of this case if they are gone into.

The judgment of the High Court from which the appellants desired to appeal was a judgment vacating a certain patent. Their Lordships expressed no opinion on the view taken by the High Court of the validity of the patent; but in the course of the argument their Lordships stated that they could not accept the view pressed upon them by Mr. Gordon that, even if the High Court had power to declare the patent invalid, it had no power to go on and order it to be cancelled in an action not brought by the Attorney-General and to which he was not a party. The Transvaal Patent Act, No. 6 of 1887 (ss. 29–31), expressly authorized judgments which are really judgments in rem in proceedings specially brought for the invalidation of letters patent.

As this point was fully argued by the appellants, their Lordships think it may be useful to repeat what they said, and remove all doubt upon the subject.

Their Lordships will, therefore, humbly advise His Majesty to dismiss this appeal, and the appellants must pay the costs.

Solicitors for appellants: *Davidson & Morris.*
Solicitors for respondent: *Burchells.*

[PRIVY COUNCIL.]

J. C.* 1904 June 1, 2, 22.

LODDER AND ANOTHER . . . . . DEFENDANTS;

AND

SLOWEY . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Contract to execute Works—Wrongful Seizure of Works by Defendants—Plaintiff entitled to determine the Contract.

Where the appellants, having guaranteed the due performance of a contract made with a municipal corporation for the execution of works on its land, agreed on the contractor's default with the respondent to complete the execution of the works on the terms of the original contract, and in effect delegated the supervision of the contract and all incidental arrangements to the corporation, and the corporation, according to the findings of the jury, improperly prevented the respondent from proceeding with the stipulated expedition and wrongfully seized the works and extruded the respondent:—

Held, that the appellants, having by their conduct constituted the corporation their agents and the delay being attributable to their acts, could not justify the seizure and re-entry; and that the respondent was entitled to treat the contract as at an end and sue on quantum meruit.

APPEAL from a decree of the Court of Appeal (Feb. 1, 1901) allowing an appeal from a decree of the Supreme Court (Aug. 25, 1900) and directing judgment to be entered for the respondent for 1015*l.* 5*s.* and costs.

The question decided was whether the respondent, who contracted under the circumstances detailed in the judgment of their Lordships, under an agreement made with the appellants, to construct a tunnel and other works on the land of the Karori Borough Corporation, is entitled to recover from the appellants, his employers, on a quantum meruit the value of the works constructed by him. His claim to do so arose in consequence of the Karori Borough Corporation having excluded the respondent from the land and prevented him from completing

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his contract with the appellants, no breach thereof by the respondent having occurred.

The action was brought on quantum meruit, or, in the alternative, on the contract after seizure of the works by the corporation and the respondent's exclusion from the site thereof. The jury found that the corporation wrongfully seized the works and plant of the respondent, and prevented him from completing the contract; that the corporation before their seizure of the works improperly prevented the respondent from proceeding with the works with sufficient expedition; that the appellants after the seizure determined and wholly refused to perform their contract with the respondent; that the respondent did not abandon it or refuse to perform it; that there was no evidence that he would have made any profit had he been allowed to finish it.

Edwards J. held that the respondent was entitled to recover against the appellants, but only nominal damages, for the reason that the respondent did not adduce evidence to shew that he could have made a profit had he been allowed to finish the contract. He said: "It is clear that the measure of damages which the plaintiff is entitled to recover from the defendants Lodder and Murphy is the amount (if any) which he has lost by exclusion from the works before their completion, and not the value of the work executed by him either at the prices mentioned in the schedule to his contract or at their market value without reference to the contract."

The Court of Appeal decided—

(1.) That in a contract to execute work on land there is an implied condition that the contractor shall have quiet possession of the land during performance of the contract as against any person rightfully claiming the site under a superior title. (2.) That where a contractor after part performance of his contract is wrongfully excluded from the land on which the works were to be executed, and is thereby prevented from completing his contract, he is entitled to treat the contract as rescinded and to sue on a quantum meruit for work and labour done and materials supplied previous to the rescission. (3.) That the measure of damage in such an action is the

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actual value of the work, labour, and materials, and it is immaterial whether the contractor, if he had been allowed to complete the contract, would have made a profit or a loss. The Court of Appeal decided that the respondent should have judgment for 1015*l.* 5*s.*

Cripps, K.C., and *Northcote*, for the appellants, contended that this judgment was wrong, and that judgment should be entered for the appellants, or that in the alternative a new trial should be ordered. The appellants had not committed any breach of contract or made any wrongful seizure, while the respondent had failed to proceed with the works with sufficient expedition to satisfy the corporation's engineer, and had in fact abandoned his contract. Thereupon the corporation, and not the appellants, had taken possession of the works. That was a bonâ fide exercise of the power conferred on them by clause 8 of the original contract made by the corporation with McWilliams, the respondent being merely a sub-contractor bound to the appellants to carry out the terms of that original contract for which the appellants had stood security for McWilliams. Under these circumstances there was no breach or abandonment or determination by the appellants of their contract. Nor was there any implied promise on their part to pay for work done, so as to enable the respondent to recover on a quantum meruit. The seizure was not made in breach of the contract between the parties, but in pursuance of an express term therein. The implied promise to maintain the respondent in possession of the site and works for the due performance of the contract could not be pushed so far as to constitute a warranty on their part that the respondent should not be excluded from possession according to the terms of his contract if he failed to carry it out. Reference was made to *Roberts* v. *Bury Commissioners*. (1) But *Sharpe* v. *San Paulo Ry. Co.* (2) was mainly relied upon. See also *In re De Morgan, Snell & Co.*, (1892) 2 Hudson's Building Contracts, p. 132; S. C. 8 Times L. R. 108; *Scott* v. *Corporation of Liverpool* (3); *Goodyear* v.

(1) (1870) L. R. 5 C. P. 310, 326. (2) (1873) L. R. 8 Ch. 597.
(3) (1858) 3 De G. & J. 334.

Mayor, &c., of Weymouth (1); *Dodd* v. *Churton* (2); *Barclay* v. *Messenger* (3); *Walker* v. *London and North Western Ry. Co.* (4); *Wood* v. *Rural Sanitary Authority of Tendring.* (5)

Skerrett, for the respondent, contended that there were three questions involved in the appeal: (1.) Are the appellants liable for the act of the engineer of the corporation in extruding the respondent from the contract works? (2.) Did condition 8 of the general conditions of McWilliams' contract justify the extrusion of the respondent? And (3.) Was the true principle adopted in assessing compensation?

As to the first question, he submitted that in every sub-contract for the performance of work on the land of another there must be implied as the basis of the contract a condition that the sub-contractor should during the subsistence of the sub-contract have quiet possession of the site without disturbance by its owner, or at least that the corporation would permit the respondent to perform his sub-contract. After the determination of McWilliams' contract the appellants were liable only as sureties under bond. With the consent of the corporation they gave the uncompleted portion of the contract to respondent. They thus became liable in contract to respondent; but no privity of contract was created between the corporation and respondent. The condition that respondent should have quiet possession of the site must be implied—*Oriental Steamship Co.* v. *Tylor* (6), per Bowen L.J.—because without such implication the respondent would have no action against the corporation, because of want of privity of contract, or against the appellants. Furthermore, the engineer of the corporation was the person designated in the sub-contract as the person to exercise the powers of extrusion, and by the letters and conduct of the parties was constituted the agent of the appellants. It was shewn that they had either refused to further perform the sub-contract, or had ratified the respondent's extrusion from the works.

As to the second question, whether the extrusion was justifiable

(1) (1865) 35 L. J. (C.P.) 12.
(2) [1897] 1 Q. B. 562.
(3) (1874) 43 L. J. (Ch.) 449.
(4) (1876) 1 C. P. D. 518.
(5) (1886) 3 Times L. R. 272.
(6) [1893] 2 Q. B. 527.

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under condition 8, it was contended that: (1.) The time for completion of the contract having expired, the power was not exercisable: *Walker* v. *London and North Western Ry. Co.* (1); *Wood* v. *Rural Sanitary Authority of Tendring*. (2) (2.) The jury had found that the corporation prevented the respondent from proceeding with sufficient expedition; and the power was not therefore exercisable. Issues 7, 14, 15, and 17 were properly left to jury; and there was no motion for a new trial, and the findings on the issues are conclusive. (3.) Condition 8 is not imported into the sub-contract because it was not applicable. It had already been exercised in McWilliams' time and the power was exhausted. Moreover, it could not be supposed that the power was to be exercised by the engineer of the corporation and not by the engineer of the appellants.

As to the third question, whether the true principle of assessing compensation was adopted, counsel was stopped by their Lordships.

Cripps, K.C., replied.

The judgment of their Lordships was delivered by

LORD DAVEY. In the month of December, 1897, a contract was made between the corporation of Karori in the Colony of New Zealand, acting by its borough council, with one John McWilliams for the construction by him of certain road works including a tunnel. The contract was subject to certain conditions by which it was provided (clause 1) that the contractor should execute the works according to the specification and to the entire satisfaction of Thomas Ward, civil engineer; (clause 4) that the engineer of the borough council should be the sole judge in all matters or questions arising out of the contract and of quality of materials or workmanship, meaning of specification, rate of progress, and general management, and that his decision should be final and conclusive in all cases; and (clause 8) that, should the contractor not proceed with sufficient expedition in the performance of the work or not execute the same in compliance with the specification or drawings, it should be in the power of the engineer on behalf

(1) 1 C. P. D. 518. (2) 3 Times L. R. 272.

of the borough council to enter on and take possession of the works and materials and complete the same at the expense of the contractor, or relet such works to another contractor, and any loss should be recoverable from the contractor or, in the alternative, to determine the contract, and on such determination the money paid under the contract should be accepted by the contractor in satisfaction of all claims under the contract.

The appellants entered into a bond with the borough council in the sum of 500*l.* for the due carrying out by McWilliams of his contract. The bond itself is not printed in the record, and their Lordships do not know the exact terms of it.

In September, 1898, McWilliams made default and, in fact, abandoned the works. The borough council thereupon called upon the appellants under their guarantee, and in the result a contract, dated November 15, 1898, was made between the appellants and the respondent for the execution by the latter on or before March 2, 1899, of the works undertaken by McWilliams and left incomplete by him. This contract contained a provision that the respondent should be deemed to have full notice of the contents and effect of all the various documents constituting McWilliams' contract, and to be bound by all the terms and conditions of such contract so far as the same were then applicable to the present contract and capable of being carried into effect.

It may be useful at this point to consider the relation which was thus constituted between these three parties, the borough council for whom the works were to be executed, the appellants, and the respondent. The borough council and the appellants seemed to have assumed that on McWilliams' default the borough council had the right to call upon the appellants to complete the works, or that the appellants had an option whether they would do so or pay the penalty on the bond. At any rate they elected to take that course with the acquiescence of the borough council, without, however, binding the corporation by any contract with them. Probably all parties considered that they were subrogated to McWilliams' rights and subject to his liabilities. Instead of executing the works themselves, the appellants engaged the respondent to do

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so. Quoad the borough council the respondent was therefore in the position of a sub-contractor only, and there was no privity of contract as between them. But as between the appellants and the respondent each party was liable to the other one for any breach of the contract. The learned counsel for the respondent referred their Lordships to some letters which passed between the solicitors of the appellants and the borough council respectively, in the month of February, 1899. It was then arranged, at the suggestion of the appellants themselves, that the respondent and the borough council should deal directly with each other, but without interfering with the position of the appellants towards the council, and, in answer to an inquiry from the solicitors of the borough council, it was explained that the meaning was that the respondent should be the agent of the appellants in making all arrangements about the tunnel, &c. These letters appear to explain the relative positions of the parties to each other with sufficient clearness.

Perhaps the expression that the respondent was to be deemed the agent of the appellants was not a very happy one, but it clearly meant that the appellants were, in a question between them and the borough council, to be bound by arrangements made with, and instructions given to, the respondent in the course of the execution of the works. On the other hand, by allowing the borough council to deal with the respondent directly, the appellants, in any question on the contract between them and the respondent, made the borough council, acting through their proper officer, the agents of the appellants as regards all matters relating to the execution of the contract, and quoad the respondent assumed the responsibility for any directions or instructions given by the council. In fact, the execution of the works was proceeded with on this footing. The respondent dealt directly with Mr. Ward, the engineer of the borough council, and received his orders and instructions from him. And the appellants left the entire supervision and superintendence of the respondent's execution of the works to Ward.

The contractor failed to complete the works within the time

specified in the contract, and in the month of July, 1899, letters were written by Mr. Ward to the appellants complaining of the condition of the works, and threatening to take the works out of their hands and complete them at their expense. Copies of these letters were forwarded by the appellants to the respondent with an intimation that unless something was done to satisfy Mr. Ward it would be necessary for the appellants to take the work out of the respondent's hands and complete it at his expense. On August 3, 1899, the officers of the borough council, purporting to act under the power contained in the eighth condition of McWilliams' contract, entered upon and took possession of the works.

The respondent shortly afterwards commenced the present action against the appellants, and by his statement of claim dated November 6, 1899, after alleging that the appellants had wrongfully entered and taken possession of the works and wrongfully determined, repudiated, and declined on their part to perform their contract, the respondent claimed for work and labour done and materials supplied by him at the request of the appellants, and, alternatively, damages for breach of contract.

The corporation of Karori was afterwards added as a defendant.

The action was tried before Edwards J. and a jury in July, 1900. The jury returned a special verdict in answers to twenty-seven questions left to them. For the purpose of this appeal the most material findings are those numbered 7, 10, 14, 17, and 24.

"7. Did the defendant corporation prior to the seizure of the works improperly prevent the plaintiff from proceeding with the works in the manner authorized by his contract? Answer: Yes.

"10. Was such seizure wrongful? Answer: Yes.

"14. Did the plaintiff proceed with the works with the rate of progress required by the defendant corporation's engineer? Answer: Yes, except that he did not comply with the letters of July 21st and 25th.

"17. Did the defendant corporation prevent the plaintiff

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from proceeding with the said works with sufficient expedition? Answer: Yes.

"24. What would have been the profit which the plaintiff would have obtained if he had been allowed to finish his contract? Answer: No evidence that any profit would have been made."

The learned judge, on cross-motions for judgment and nonsuit by the plaintiff and both defendants respectively, held that the corporation were under no contractual liability towards the respondent, and were liable only for the agreed value of certain plant which they had taken. There is no appeal from this part of the judgment. As against the appellants he held that there was an implied warranty by the appellants that the respondent should have undisturbed possession of the land for the purposes of the contract, and the appellants were liable to the respondent for breach of this implied warranty. But he held that the measure of damages was the amount (if any) which the respondent had lost by exclusion from the works before completion, and, as there was no evidence before the jury that the respondent had suffered any loss, he gave them the option of a new trial. And the learned judge entered judgment, dated August 25, 1900, accordingly.

This judgment was reversed by the Court of Appeal, and by their judgment of February 1, 1901, judgment was ordered to be entered for the respondent for 1015*l.* 5*s.* with costs. The present appeal is from this judgment.

The learned judges in the Court of Appeal agreed with Edwards J. that the appellants were liable to the respondent for the wrongful re-entry and seizure by the borough council, but on rather different grounds. Connolly J. held that Ward must be treated as agent for the present appellants, with an almost unlimited authority to act for them and bind them in responsibility for his acts. Williams J., while agreeing with the views expressed by Edwards J., thought further that, even if that conclusion were incorrect, there was an implied warranty or an implied condition of the contract that the respondent should not be wrongly interfered with by the person to whom by the contract the appellants had entrusted the superintendence

of the respondent's work, namely, the engineer to the borough council. On the measure of damages the learned judges differed from Edwards J. They adopted the statement of the law in the notes to *Cutter* v. *Powell* in Smith's Leading Cases, and they thought that Lord Cranworth's judgment in *Ranger* v. *Great Western Ry. Co.* (1), which had been relied on by the learned judge in the Court below, had been misapplied. All that that case decided, in their opinion, was that the appellants had no claim to equitable relief. Accordingly they held that the respondent was in the circumstances entitled to treat the contract as at an end and to sue on a quantum meruit for work and labour done and materials supplied, the net amount of which the jury had found to be 1015*l.* 5*s.*

Their Lordships agree with the conclusion of the Court of Appeal. They do not dissent from the contention of Mr. Skerrett, in his very able argument for the respondent, that in the circumstances of this case it was an implied term of the appellants' contract with the respondent that the borough council would permit the respondent, who was in the position of a sub-contractor, to perform his contract. But they think that the simplest and safest ground on which to rest the liability of the appellants is that they made the borough council, acting through their engineer, their agents for superintending the respondent's execution of his contract with full power to act for them in respect thereto. Not only is this proved by the arrangement made by the appellants with the borough council that the respondent should deal directly with the council and by the actual course of dealing by all parties, but their Lordships think that it was also in accordance with the contract which by clause 8 incorporated the conditions of McWilliams' contract so far as then applicable.

It was, however, contended for the appellants at their Lordships' bar that, according to the true construction and effect of clause 8 of the respondent's contract, the borough council had the right to re-enter upon the works if, in the opinion of the engineer, the respondent was not proceeding with sufficient expedition in the performance of the work. For this purpose

(1) (1854) 5 H. L. C. 72.

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it was said the engineer was not acting as the officer of the borough council, but was placed by the contract in the position of an arbitrator or referee, and his decision was made conclusive on the rate of progress. No imputation, it was rightly said, had been made upon Mr. Ward's good faith, and, therefore, the re-entry must be held to have been rightfully made, and no cause of action arose from it.

Admitting this to be so, and assuming that the true effect of the incorporation of the conditions of McWilliams' contract, so far as the same were then applicable, was to give the right of re-entry, under clause 8 of McWilliams' contract, not to the appellants, but to the borough council, the answer to the argument appears to their Lordships to be that the jury have found (7.) that the corporation prior to the seizure of the works improperly prevented the respondent from proceeding with the works in the manner authorized by his contract, and (17.) that the corporation prevented the respondent from proceeding with the works with sufficient expedition.

It was not suggested before their Lordships that these matters were not properly before the jury, or that the questions were not properly left to them, or that there was not evidence before them on which they could properly find as they did. Their Lordships do not think that the appellants are precluded by the express finding that the seizure was wrongful from raising any questions of law, but they think that the 7th and 17th findings are fatal to the appellants' argument. The corporation, of course, means the borough council, acting by their engineer, Mr. Ward. Their Lordships have already expressed their opinion that the borough council and Ward were made the appellants' agents for the purpose of superintending the execution of the contract by the respondent, and the acts done and orders given by the borough council or Ward, which the jury have found prevented the respondent from proceeding with the works with sufficient expedition, were therefore within the scope of the authority conferred by the appellants. Their Lordships hold that a party to a contract for execution of works cannot justify the exercise of a power of re-entry and seizure of the works in progress when the alleged default or delay of

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the contractor has been brought about by the acts or default of the party himself or his agent: *Roberts* v. *Bury Improvement Commissioners*. (1)

Their Lordships also agree with the learned judges as to the proper measure of damages, or (more accurately) as to the right of the respondent to treat the contract as at an end and sue for work and labour done instead of suing for damages for breach of the contract.

Their Lordships will, therefore, humbly advise His Majesty that the judgment appealed from should be affirmed and the appeal dismissed. The appellants will pay the costs of the appeal.

Solicitors for appellants: *Mackrell, Maton, Godlee & Quincey.*
Solicitors for respondent: *Shaen, Roscoe, Massey & Co.*

[PRIVY COUNCIL.]

J. C.* 1904 June 7.

CANADIAN PACIFIC RAILWAY COMPANY . . . . . } DEFENDANTS;

AND

BLAIN . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Practice—Special Leave to Appeal—Decree of Supreme Court of Canada—Petition by Appellant to Supreme Court.

Special leave to appeal from a decree of the Supreme Court of Canada will not be granted to a petitioner who has elected to appeal to that Court and not to His Majesty direct, unless a question of law is raised of sufficient importance to justify it.

Ex parte Clergue, [1903] A. C. 521, followed.

THIS was a petition by the appellants above named for special leave to appeal from a decree of the Supreme Court dated November 30, 1903. It stated that the respondent had

* *Present:* LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

(1) L. R. 5 C. P. 310.

J. C. 1904 CANADIAN PACIFIC RAILWAY v. BLAIN.

sued for damages in respect of injuries suffered while a passenger on the petitioners' railway, occasioned by the assaults of a fellow-passenger; that the jury found the petitioners guilty of negligence and judgment was entered for $3500 damages; that the Court of Appeal for Ontario dismissed the petitioners' appeal from the said judgment; that on the petitioners' appeal to the Supreme Court the same was modified, and a new trial ordered unless the respondent would accept $1000 damages.

The petition submitted that the judgment of the Supreme Court had decided for Canada the general question of law as to the liability of a railway company in respect of assaults on one passenger by another in assumed accordance with the jurisprudence of the United Kingdom; that the question was one of great and general public importance, and that the petitioners were entitled to ask that the law, at present unsettled in the United Kingdom by *Pounder* v. *North Eastern Ry. Co.* (1) and *Cobb* v. *Great Western Ry. Co.* (2), should be resolved by the Court of last resort.

Blake, K.C., for the petitioners.
Haldane, K.C., for the respondent, was not heard.

The judgment of their Lordships was delivered by

LORD DAVEY. The question which is put forward by the petitioners as the important question of law, for the decision of which they ask this Board to advise the Crown to exercise its prerogative of giving leave to appeal from the Supreme Court of Canada, is thus stated in the petition: "The petitioners submit that their obligations to their passengers, whether arising out of contract or otherwise, do not include the duty of protecting them against assaults by their fellow-passengers, or render them answerable in damages for failure to afford such protection." Their Lordships are not disposed to advise His Majesty to give leave to appeal from the Supreme Court for the purpose of discussing that question. They repeat what was said by this Board in the case of *Clergue* v. *Murray*, *Ex*

(1) [1892] 1 Q. B. 385. (2) [1893] 1 Q. B. 459; [1894] A. C. 419.

parte Clergue (1), where, as in the present case, the petitioner elected to appeal to the Supreme Court, and not to His Majesty in Council direct, as he might have done. After quoting the case of *Prince* v. *Gagnon* (2) and *Consumers' Cordage Co., Ld.* v. *Connolly*, their Lordships say this: "It would be nothing less than a miscarriage of justice if their Lordships were to impose on the respondents (the defendants in the action) a fourth hearing of the case with all the expenses attendant upon an appeal to His Majesty in Council, after there have been three decisions in the Canadian Courts, the final decision being that of the Supreme Court of the Dominion, which is entitled to every confidence on the part of the Canadian people."

Their Lordships will humbly advise His Majesty that the petition ought to be dismissed. The petitioners will pay the respondent's costs of opposing the petition.

Solicitors for petitioners: *Blake & Redden.*
Solicitors for respondent: *Fox & Preece.*

(1) [1903] A. C. 521. (2) (1882) 8 App. Cas. 103.

[HOUSE OF LORDS.]

H. L. (E.) 1904 July 14.

MENDELSSOHN . . . . . APPELLANT;

AND

RATCLIFF AND ANOTHER . . . . . RESPONDENTS.

Stock Exchange — Default of Broker — Liquidation under Stock Exchange Rules—Claim by Jobber—Right of Action against Broker—Bankruptcy—Right of Stock Exchange Creditor to petition in Bankruptcy.

When a member of the London Stock Exchange is declared a defaulter and his contracts are dealt with by the official assignee of the Stock Exchange, the proceedings in that liquidation are not an accord and satisfaction of the member's debts, and do not bar his creditors from suing him at law for the balance of their claims after deducting the dividends received by them in that liquidation.

A creditor who has obtained judgment in such an action can maintain a petition in bankruptcy against the defaulter.

The decisions of the Court of Appeal, [1902] 2 K. B. 653 and [1903] 1 K. B. 216, affirmed.

HERE there were two separate appeals. In the first the facts were as follows:—

The appellant was a broker, and the respondents were jobbers on the London Stock Exchange. On May 15, the pay-day of the mid-May settlement, 1901, there was due from the appellant to the respondents 986*l.* for differences in the purchase and sale of stocks. On May 16 the appellant was declared a defaulter on the Stock Exchange. He handed over his books and assets to the official assignee, who dealt with the estate under the rules of the Stock Exchange. At the settlement at the end of May the respondents, according to the rules and custom of the Stock Exchange, completed with the appellant's principals such transactions as were then open between the respondents and the appellant's principals, and received from the appellant's principals the sum of 281*l.* in respect of those transactions. This sum the respondents handed over to the official assignee of the Stock Exchange, as they were bound to do by the rules. They brought in June an action

against the appellant to recover the debts due to them from the appellant. The action was tried before Mathew J. without a jury, and judgment was given for the plaintiffs for the two sums, 986*l.* and 281*l.*, less a dividend which they had received from the official assignee of the Stock Exchange. (1) This decision was affirmed by the Court of Appeal (Collins M.R., Stirling and Cozens-Hardy L.JJ.). (2)

In the second appeal the facts stood thus. In October a bankruptcy notice was served on the appellant, and a bankruptcy petition was presented against him by the respondents in respect of their claim, after deducting the dividends received by them in the Stock Exchange liquidation. Mr. Registrar Brougham made a receiving order in bankruptcy against the appellant. This order was affirmed by the Court of Appeal (Vaughan Williams, Stirling, and Cozens-Hardy L.JJ.) (3)

July 12, 14. *M. Muir Mackenzie* and *J. R. Adkin*, for the appellant. The proceedings in the liquidation under the rules of the Stock Exchange amounted to an accord and satisfaction of the respondents' claims, or to an agreement not to sue. At the least those proceedings have the effect of suspending the creditor's rights at law. The respondents have taken part in those proceedings, have acknowledged their jurisdiction and effect, and have received dividends under them. This debars them from maintaining their action. The Stock Exchange administration amounted to a cessio bonorum of the appellant's assets—a general assignment of all his property for the benefit of his Stock Exchange creditors: *Whitmore* v. *Turquand* (4); *Tomkins* v. *Saffery* (5); *Richardson* v. *Stormont* (6) and the cases there cited. The two cases of *Ex parte Ward* (7) are distinguishable. The present case raises a new point not dealt with by the authorities. The proceedings in the liquidation were not completed; rights of action and proceedings in bankruptcy are suspended during the pendency of the

(1) [1901] 2 K. B. 844.
(2) [1902] 2 K. B. 653.
(3) [1903] 1 K. B. 216.
(4) (1861) 3 D. F. & J. 107.
(5) (1877) 3 App. Cas. 213.
(6) [1900] 1 Q. B. 701.
(7) (1882) 20 Ch. D. 356; 22 Ch. D. 132.

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liquidation. The respondents cannot both approbate and reprobate.

Rufus Isaacs, K.C. (*A. H. Carrington* with him), for the respondents. The rules of the Stock Exchange expressly recognise the right of the creditor to sue by providing (rule 54) that no member shall attempt to enforce by law a claim arising out of Stock Exchange transactions against a member, without the consent of such member, of the creditors of the defaulter, or of the committee. The necessary consent was obtained here. The two decisions of *Ex parte Ward* (1) entirely cover the present case.

Muir Mackenzie, in reply.

FIRST APPEAL.

EARL OF HALSBURY L.C. My Lords, in following the argument in this case I have had some difficulty, I confess, in knowing what the new point was; so far as I am concerned I have not been able to find out anything new. I entirely concur with the judgments which have been pronounced by the original judge and by the Court of Appeal, and it seems to me that they had no alternative but to pronounce the judgment which they did pronounce considering the previous judgments in your Lordships' House and the two judgments in *Ex parte Ward*. (1) There is really nothing new in this case: the only suggestion which your Lordships have heard from the learned counsel is this—that some very learned persons had not a particular point before their minds and did not give an express judgment upon it. I have been unable to follow that suggestion.

Here is undoubtedly a debt—I do not propose to go through the whole of the circumstances by which that debt was arrived at, nor is it very material—there is a debt, a vested cause of action, and you can only get rid of that debt in one way or another. As Mr. Muir Mackenzie has very justly said, there is not a release—he does not suggest that it is a release—there is no express bargain on the subject; but he says from the fact of its being practically a cessio bonorum you must infer an agree-

(1) 20 Ch. D. 356; 22 Ch. D. 132.

ment not to sue. I am wholly unable to follow that. I think the answer which has already been given by Mr. Rufus Isaacs is a conclusive one. I can find no trace of any bargain which can be relied on to shew that there is any impediment to a right to sue.

With reference to the other question, the 281*l.*, it seems to me that that depends on totally different grounds. It is under a different contract which has no reference to the question we are discussing here.

I am, as I said originally, unable to follow the subtlety which has invented a new point in this case. Upon the facts it appears to me that there is no answer to the plaintiffs' demand; and under these circumstances I move your Lordships that the appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am entirely of the same opinion. I do not think that Mr. Muir Mackenzie has made out from the contract in this case either any implied satisfaction or any agreement not to sue.

LORD JAMES. My Lords, if this had been a case of first impression, I should have been disposed to give considerable weight to the able argument of Mr. Muir Mackenzie; but I think the weight of authority is so strong against the case of the appellant that it is impossible for your Lordships not to say that this appeal must be dismissed.

LORD LINDLEY. My Lords, I am of the same opinion.

The first point which was made by Mr. Muir Mackenzie and which deserved attention was based entirely upon the possibility of inferring from these rules an agreement not to sue. If that could be made out he would be right; but when the rules are looked at it appears to me absolutely impossible to arrive at any such inference. The inference is negatived completely by rule 54, to say nothing about the general view of the rules as a whole. In face of rule 54 to say that there is an agreement not to sue is to my mind absolutely impossible.

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With respect to the 281*l.*, it is a sum payable by the defendant to the plaintiffs under a special contract based upon the rules of the Stock Exchange. That is an obligation which creates a debt, and that obligation has never been discharged. I have no doubt that this appeal ought to be dismissed with costs.

SECOND APPEAL.

Muir Mackenzie, for the appellant, said that it was of no use to argue the second appeal.

EARL OF HALSBURY L.C. I think so. I think it would be impossible for us after the judgment we have given to give judgment in your favour in the second appeal; it would be a contradiction.

Order of the Court of Appeal in each appeal affirmed and appeals dismissed with costs.

Lords' Journals, July 14, 1904.

Solicitors: *Osborn & Osborn; Michael Abrahams, Sons & Co.*

[HOUSE OF LORDS.]

MERCER . . . . . APPELLANT; H. L. (E.) 1904 July 15.

AND

LIVERPOOL, ST. HELEN'S AND SOUTH LANCASHIRE RAILWAY COMPANY } RESPONDENTS.

Lands Clauses Acts — Compensation — Lands Injuriously Affected — Interest created after Notice to Treat—Lands Clauses Consolidation Act, 1845 (*c.* 18), *ss.* 18, 68.

The owner of land received from a railway company notice (under their statutory powers which incorporated the Lands Clauses Consolidation Act, 1845) to treat for part of his land, and the purchase-money was settled by agreement to include compensation for all injurious affection. Between the notice to treat and the agreement the owner granted a lease of some land near to the land purchased. The railway company exercised their powers and injuriously affected the lessee's land:—

Held, that the sum paid to the owner must be taken to have included compensation for the injury to the lessee's land, and that the lessee was not entitled to compensation under the Lands Clauses Act, 1845.

The decision of the Court of Appeal, [1903] 1 K. B. 652, affirmed.

By the St. Helen's and Wigan Junction Act, 1886 (incorporating the Lands Clauses Consolidation Act, 1845), the respondents had power to construct a railway and purchase land belonging to Lord Gerard. Under s. 13 of the special Act the respondents were bound to execute certain works.

In October, 1891, the respondents gave Lord Gerard notice to treat for the purchase of part of his land and for the compensation for damage by execution of the works. In January, 1892, Lord Gerard sent in a claim, and in October, 1892, by agreement, the respondents paid him 23,000*l.* for the land, to include all compensation for all the damage by severance or otherwise injuriously affecting Lord Gerard's other property.

Meanwhile, namely, in June, 1892, Lord Gerard granted to the appellant's predecessor in title a lease for 999 years of land near and opposite to the land purchased, with covenants (inter alia) for building houses. The respondents exercised their

H. L. (E.) 1904 MERCER v. LIVERPOOL, ST. HELEN'S AND SOUTH LANCASHIRE RAILWAY.

statutory powers in making the railway, and in executing works referred to in s. 13 of the special Act of 1886 injuriously affected part of the land leased to the appellant's predecessor and since assigned to the appellant. For this injury the appellant claimed compensation under the Lands Clauses Act, 1845, s. 68. The arbitrators having awarded the appellant 371*l.* as compensation, she brought an action against the respondents to enforce the award. Lord Alverstone C.J., who tried the action without a jury, gave judgment for the plaintiff. (1) This decision was reversed by the Court of Appeal (Vaughan Williams, Stirling, and Mathew L.JJ.). (2) Hence this appeal.

July 14, 15. *Cripps, K.C.*, and *Haldane, K.C.* (*MacConkey* with them), for the appellant. No doubt a notice to treat for the purchase of land binds the land so that the owner cannot create any new interest in it to the prejudice of the promoters. Whatever interest he may create in it is not a subject of compensation under the Lands Clauses Act, 1845. But it has never been decided or suggested that the same disability applies to adjoining land which is not the subject of a notice. A notice to treat is of the nature of an inchoate contract until the price is fixed: *Harding* v. *Metropolitan Ry. Co.* (3) Here the interest was created before the price was fixed. There is nothing in the Lands Clauses Act expressly or by implication excluding interests so created from compensation. The judgment of Fry L.J. in *Reg.* v. *Poulter* (4) seems to affirm that they are not excluded. Neither the appellant nor her predecessor in title had any knowledge of the notice to treat or of the railway scheme for dealing with the land. There is no evidence that the 23,000*l.* included compensation for the injurious affection which the appellant has admittedly suffered.

McCall, K.C., and *Horridge, K.C.* (*W. H. Loraine* with them), for the respondents. The compensation to be assessed under a notice to treat has always been held to include injurious affection to the other property of the owner with which it

(1) [1901] 2 K. B. 753.
(2) [1903] 1 K. B. 652.
(3) (1872) L. R. 7 Ch. 154.
(4) (1887) 20 Q. B. D. 138.

is connected, and that compensation must be assessed once for all: *Cowper-Essex* v. *Acton Local Board.* (1) An interest created by the owner in the land to be purchased after notice to treat is not a subject for compensation, and there is no authority or reason for the appellant's claim to be found in the books, as is clearly shewn in the judgments in the Court of Appeal.

Haldane, K.C., in reply.

EARL OF HALSBURY L.C. My Lords, in this case I cannot entertain any doubt that the judgment of Stirling L.J. was right.

The position of things which is here disclosed upon the facts is that at the time when the notice to treat was given Lord Gerard was the owner, not only of the land intended to be taken under the powers of the Act, but of other land which might or might not be injuriously affected, without any communication to the railway company of the possibility of his letting the land for building purposes on a building speculation and without any communication to the railway company that he had done so. The compensation was ascertained, not by the ordinary course of an inquiry by an assessment jury, but by a bargain between the parties. Of course, inasmuch as we have nothing at all before us as to what did pass when that amount of 23,000*l.* was agreed upon between the parties, all we have to do is to look at the situation of the parties and see what they were assessing at that time. What they were assessing at that time is to be ascertained by the notice to treat and the claim made in pursuance of that notice to treat by Lord Gerard. Looking at those documents, it is impossible to doubt that what it was competent to the claimant Lord Gerard to claim, and what unless it had been withdrawn from the power of the assessment jury, if it had been tried before a jury, it would have been competent to him to claim before the jury, was compensation in addition to the purchase-money of his land for all injurious affecting of his other land. For my own part, I cannot entertain the least doubt in the world that any

(1) (1889) 14 App. Cas. 153.

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compensation that he might have claimed he was bound to claim then and there, taking it upon the hypothesis that it was tried before a compensation tribunal. Whether it was tried in that form or not, the theory of the bargain between the parties must be that the amount which was settled is that which would have been settled by a compensation jury. Then what is the bargain? 23,000*l.* is given for all that he could have claimed at that time, and all that he could have claimed at that time included the amount of compensation he would have been entitled to for any injurious affection of his lands. Therefore, as to the railway company on the one side and Lord Gerard on the other, it seems to me that that question is finally and absolutely determined between them by the bargain they agreed to instead of its being settled for them by the compensation tribunal.

What happened between the parties to the building speculation and the claimant against the railway company does not affect the position of the railway company at all. No question is before us now and no question can be before us as to the relation that the settlement between the railway company and Lord Gerard bears to the relations between Lord Gerard and his lessee. I do not enter into the question as to whether he did or did not communicate the facts to the person to whom he was letting his land for 999 years on a building lease—I forbear to encourage further litigation between the parties. It might be that he might be regarded as having unknown to the lessee done something in the nature of a breach of covenant for quiet enjoyment by having placed a disability on that part of the land which he had let for this long term, or it might be that in recovering that amount of money which he did recover he might be considered to be a trustee for so much of the compensation as was appropriate to the deterioration of the land which he had so let. That is another point of view from which it might be regarded. I hesitate to make any suggestion because I do not think it would be to the advantage of these parties—either to Lord Gerard or to the claimant here—to encourage the idea of further litigation between them.

It would be a most monstrous thing to suppose, after the railway company had given compensation, not only for the land that was taken, but for all injurious affection of the land at the time that the notice to treat was served, that without any notice to them of any further relation between the claimant against them and any one else they should be called upon to pay further and other compensation to some one else, although they had in the first instance paid and satisfied the demand of the claimant, whose claim included all this very compensation which is now sought to be recovered against them. The suggestion that this compensation could be recovered again, and by a person to whom Lord Gerard had transmitted his rights for compensation without notice to the railway company, certainly would introduce a confusion in the settlement of such matters which I should be very loth indeed to encourage.

In these circumstances it appears to me that the decision of the Court of Appeal is absolutely right, and I move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion. As regards the question between the plaintiff and the railway company, I am unable to see any answer to the argument of Stirling L.J. I am quite content with his judgment, and I am unable to add anything to it.

LORD LINDLEY. My Lords, this case is one of novelty and of great importance, not only to railway companies, but to landowners.

I agree entirely in the judgment of the Court of Appeal, and I can add really nothing to the judgment of Stirling L.J.

The broad principle appears to me to be that it is not competent for an owner of land who has received notice to treat to deal with any of his land either taken or injuriously affected by the company, so as to increase the burdens of the company as regards the compensation to be made in respect of such land or any of it.

In this case it would be most unjust to the company to depart from this principle, as the company settled with the

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owner without notice of his dealings with his land after the notice to treat was given and after his claim was sent in, and he insisted all along on his right to have the streets lowered: see s. 13, clause 7, of the special Act, 1886.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 15, 1904.

Solicitors: *Bell, Brodrick & Gray, for J. Haslam Fox, St. Helen's, Lancashire; Maples, Teesdale & Co., for Oppenheim & Son, St. Helen's.*

[HOUSE OF LORDS.]

H. L. (E.) 1904 *Aug.* 5.

REYNOLDS . . . . . APPELLANT;

AND

ASHBY & SON . . . . . RESPONDENTS.

Fixtures — Machinery attached to Freehold — Presumption of Law — Trade Fixtures — Mortgage — Hire-purchase Agreement — Rights of Mortgagee against Owner of Machinery — Licence to remove Trade Fixtures — Entry of Mortgagee into Possession.

Machines were supplied by the owner of them to the lessee of a factory upon the hire-purchase system, the machines to remain the property of the owner till they had been wholly paid for; upon default in payment the owner to have power to determine the hiring and remove the machines. They were affixed, as the owner knew, to concrete beds in the floor of the factory by bolts and nuts, and could have been removed without injury to the building or the beds. The lessee made default in payment, and the owner brought an action to recover the machines or their value from a mortgagee of the premises who had taken possession:—

Held, that the machines had been so affixed as to pass by the mortgage to the mortgagee.

The decision of the Court of Appeal, [1903] 1 K. B. 87, affirmed.

HOLDWAY, the lessee of land in Reading for ninety-nine years from 1892, was in April, 1900, building a factory thereon for a joinery business. On April 7 Holdway mortgaged the premises to Burrows, "together with the buildings, fixtures,

machinery and fittings erected thereon." Holdway afterwards executed a second mortgage to Hatt, and on August 27 a third mortgage to the respondents.

On August 30 Holdway and the appellant (a manufacturer of machines) made a hire-purchase agreement, whereby the appellant agreed to let machinery to be used in the factory, and Holdway agreed to hire and to pay for it by instalments at specified times, the machinery to become the property of Holdway as soon as the payments were all duly made, but if default was made in punctual payment of any of the instalments Holdway might determine the hiring and enter and resume possession of the machinery, which was to continue to be the sole and absolute property of the appellant until the last payment was made.

In September the machines—heavy carpenter's tools—were put up on the ground floor of the factory (in the words of Lord Lindley's judgment) "on beds of concrete prepared for them. The machines were worked by steam power transmitted from a steam engine by shafts, wheels, and gearing in the usual way. Each machine was complete in itself. Each was fastened down to its concrete bed by bolts and nuts. The bolts were firmly fixed in the concrete and passed through and projected beyond holes in the machine. The nuts were screwed on the ends of the bolts where they projected, and the machines were thus held fast. By unscrewing the nuts each machine, although heavy, could no doubt be raised up and removed without injury to the building containing it, and without injury to its concrete bed and to the bolts embedded in it."

In November Hatt took possession of the premises under his mortgage, and Holdway having made default in payment the appellant gave him notice determining the hiring and demanding the return of the machinery. In December the respondents took transfers of the prior mortgages, having bought up the mortgagees' interests. The respondents having refused to deliver up the machinery the appellant brought this action against them, claiming the machinery or damages. Lawrance J. who tried the action did not leave any question to the jury and entered judgment for the defendants. This decision was affirmed

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by the Court of Appeal (Collins M.R., Romer and Mathew L.JJ.) (1) Hence this appeal.

July 8, 11, 12. *Haldane, K.C.*, and *Herbert Reed, K.C.* (*Rowlatt* with them), for the appellant. The question which should have been left to the jury was whether the machinery and apparatus had been affixed to the premises with the intention of improving the inheritance, or merely for their more convenient use as chattels, and there can be no doubt which way that question would have been answered, namely, for their more convenient use. The stipulation that they were not to be the property of the lessee till they were fully paid for and that the owner was to have power to remove them is conclusive on that point. At the least therefore a new trial should be granted. But there is enough in common sense and authority to justify a judgment for the appellant. The importance of intention was clearly recognised by this House in *Leigh* v. *Taylor*. (2) That was between tenant for life and remainderman. The argument is a fortiori in a case of trade fixtures between the lessee and the lessor or mortgagee. If tapestries structurally attached to the freehold are movable chattels, why are not carpenter's tools which the owner had the right to remove upon default in payment? There was only so much fixing as was necessary for steadiness. "The object and purpose of annexation" have to be considered, said Parke B. in *Hellawell* v. *Eastwood* (3), where spinning mules were sunk into a stone flooring; and see Lord Blackburn's judgment in *Wake* v. *Hall*. (4) The custom of hire and purchase agreements strengthens the argument from intention and has been recognised by the Courts: *Gough* v. *Wood* (5) where the owner's title prevailed over the mortgagees'. It was otherwise in *Walmsley* v. *Milne* (6): but the practice of such agreements had not then arisen, and Willes J. subsequently expressed doubts of the accuracy of the decision. The question is one of fact, of degree of attachment as well as of intention,

(1) [1903] 1 K. B. 87.
(2) [1902] A. C. 157, 161.
(3) (1851) 6 Ex. 295, 312.
(4) (1883) 8 App. Cas. 195, 204.
(5) [1894] 1 Q. B. 713.
(6) (1859) 7 C. B. (N.S.) 115.

and ought therefore to have been left to the jury as it was in *Climie* v. *Wood*. (1) In *Holland* v. *Hodgson* (2), too, the question was treated as one of evidence. The Court of Appeal followed *Hobson* v. *Gorringe* (3); but in the Chancery Division the judge discharges the functions of a jury. The present case is like *Lyon* v. *London City and Midland Bank*. (4) The doctrine which was the basis of many of the older cases, that whatever is affixed, however slightly, to the soil becomes part of the freehold, has been dissipated once for all by *Leigh* v. *Taylor*. (5) Whatever authority there may be for the favour shewn by the Court of Appeal to the position of a mortgagee there is no reason or justice. It is a fixed principle of sound law that a man cannot convey to another a better title than he has himself. The hirer of this machinery had no title to it until he paid the full price, which he never did. How then could he give the mortgagee a good title? This principle seems to have been overlooked in some of the decisions relied on below. There is now an opportunity—one which may never recur—of re-establishing the true principle and overruling unsound dicta and decisions, including those which support presumptions in favour of the freehold.

[They also cited *Chidley* v. *West Ham Churchwardens* (6) and *Tyne Boiler Works* v. *Longbenton Overseers*. (7)]

J. A. Hamilton, K.C., and *A. Powell, K.C.* (*Keeling* with them), for the respondents. The appellant knew that the machinery was expressly included in the mortgage and how it was affixed. He therefore acquiesced in the passing of the property in the machinery to the mortgagees. There was no evidence to rebut the presumption that the machinery had become part of the freehold, and Lawrance J. was right in withdrawing the case from the jury. The law has long been well settled that such machinery passes to the mortgagee. This method of fixing machinery in cotton mills has always been followed. No custom of hire and purchase agreements

(1) (1868) L. R. 3 Ex. 257; (1869) L. R. 4 Ex. 328.
(2) (1872) L. R. 7 C. P. 328.
(3) [1897] 1 Ch. 182.
(4) [1903] 2 K. B. 135.
(5) [1902] A. C. 157, 161.
(6) (1874) 32 L. T. 486.
(7) (1886) 18 Q. B. D. 81.

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can override the long line of authorities which establish that machinery goes to the mortgagee as part of the building.

[They cited the cases referred to in Lord Lindley's judgment and in the Court of Appeal.]

H. Reed, K.C., in reply. The question of the mode and effect of fixing the machinery was entirely one of fact and exclusively for the jury.

The House took time for consideration.

EARL OF HALSBURY L.C. (read by Lord Macnaghten). My Lords, I cannot say that I am satisfied with the mode in which this case has been disposed of.

There are various modes by which things when they are trade fixtures can be protected from being absorbed by the owner of the freehold or by a mortgagee, and I should hesitate very much before I agreed that such fixtures as are in question here and which could only be used when fixed, must necessarily belong to the freeholder or to the mortgagee. By an express or implied contract between the parties interested in such a transaction, machinery for the purpose of working in a factory might be protected so that an unpaid vendor who has lent on the hire system machinery to a person who wanted to use it in his mill, might make it safe from being absorbed either by creditor or landlord. There is nothing, however, here from which I can infer either an express or implied contract for the removal of these articles, which undoubtedly were fixed, and under these circumstances I do not dissent from the conclusion at which your Lordships have arrived.

I only desire to say that I agree to affirm this judgment upon the special facts which I find and from the absence of any evidence which can alter the rule which has been so many times affirmed and upon which the learned judge acted when the case was before him.

LORD MACNAGHTEN. My Lords, speaking for myself I agree with the conclusion at which the Lord Chancellor has arrived. That the law with regard to fixtures as between mortgagor and mortgagee is perfectly satisfactory I should be sorry to affirm;

but I am sure much mischief would be created if there were a departure at this stage from the law which has been looked upon as governing such transactions as this ever since the case of *Mather* v. *Frazer*. (1)

LORD JAMES. My Lords, it must be taken that the appellant was aware that the machines would be used in a factory and would be affixed in the usual manner to the building.

In the first instance I was disposed to think that the question of chattel or fixture, being one of fact, ought necessarily to have been submitted to the jury, but apparently the course taken by the learned judge in treating the question as one of law, or as one of fact upon which the jury were bound to accept his directions and apply the law as declared by him, was correct, and certainly was acquiesced in by both parties to the suit.

The manner in which the machines were affixed to the buildings has been clearly brought to the notice of your Lordships, and is shewn by some sketches set out in the case. This affixing of the machines is to obtain steadiness, and effects the usual condition under which such machines are used.

My Lords, the authorities controlling the questions respecting the difference between fixtures and chattels are very numerous, and have arisen between different parties. The rights of landlord or tenant, of mortgagor or mortgagee, and liability to being rated, have all brought this question to a legal issue for the determination of our Courts.

I do not propose to review those authorities in detail, but having consulted and considered them, I have come to the conclusion that the weight of authority is in favour of the view that these machines must be held to be affixed to the building so as to pass under the mortgage as being a portion of the factory.

The cases supporting this view are very numerous, but the principal case now generally referred to is that of *Hobson* v. *Gorringe* (2), the authority which Lawrance J. acted upon.

(1) (1856) 2 K. & J. 536.

(2) [1897] 1 Ch. 182.

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Doubtless there are cases and dicta upon which the appellants are entitled to rely. *Hellawell* v. *Eastwood* (1) and several other cases were relied upon at the bar to shew that these machines should be regarded as chattels—but in none of these cases did the question arise between mortgagor and mortgagee, and in some of them the decisions are explained upon grounds other than those existing in the present case.

In the same way *Trappes* v. *Harter* (2), a case arising out of a mortgage, was decided principally upon a question of local custom, and in *Lyon* v. *London City and Midland Bank* (3) the decision in favour of some chairs being chattels appears to have been correctly decided upon the special facts of that case.

My Lords, it was argued at the bar that as Holdway had not paid for the machines they remained the property of the appellant, and could not by any act of Holdway be dealt with as fixtures, but the argument cannot, I think, prevail. The machines were sold by the appellant for the purpose of being used in the manner in which they were used. In order so to use them it was necessary that they should be fixed, and so become part of the building.

For these reasons I feel that, following a great preponderance of authority, your Lordships' judgment should be in favour of the respondents.

LORD LINDLEY. My Lords, Holdway did not pay the instalments of his purchase-money as they became due, and the machines therefore never became his property. The appellant knew that the machines were wanted in order to fit up a factory which Holdway was building. The purpose for which the machines were obtained and fixed seems to me unmistakable; it was to complete and use the buildings as a factory. It is true that the machines could be removed if necessary, but the concrete beds and bolts prepared for them negative any idea of treating the machines when fixed as movable chattels.

The question is whether they passed by the mortgage. But for the fact that Holdway had not paid for them the question

(1) 6 Ex. 295. (2) (1833) 2 C. & M. 153.
(3) [1903] 2 K. B. 135.

would not in my opinion be open to the slightest doubt. There is a long series of decisions of the highest authority shewing conclusively that as between a mortgagor and a mortgagee machines, fixed as these were to land mortgaged, pass to the mortgagee as part of the land. The decisions in question begin with *Walmsley* v. *Milne* (1), and include *Ex parte Barclay* (2); *Mather* v. *Frazer* (3); *Climie* v. *Wood* (4); *Longbottom* v. *Berry* (5); *Holland* v. *Hodgson* (6); *Gough* v. *Wood* (7); *Hobson* v. *Gorringe*. (8)

Others were referred to in the argument, but I need only mention *Southport and West Lancashire Banking Co.* v. *Thompson* (9), where it was held that whether the mortgagor is an owner in fee or is only a leaseholder (as in this case) is immaterial with reference to the question now under consideration. My Lords, it is quite impossible to overrule these decisions.

It must be conceded that there are dicta in other cases and even decisions which shew that for some purposes even machines more or less like these have been treated as chattels. There is *Hellawell* v. *Eastwood* (10), a case of distress which has been much commented on in later cases, and is of questionable authority; there are rating cases, such as *Chidley* v. *West Ham* (11) and *Tyne Boiler Works Co.* v. *Overseers of Longbenton* (12); there is the case of the miners' huts, *Wake* v. *Hall* (13), which arose between miners in the Peak District and landowners, and turned entirely on a local custom; there is the tapestry case, *Leigh* v. *Taylor* (14), which arose between a tenant for life and a remainderman; there is *Fisher* v. *Dixon* (15), which arose between the heir and the executors of the deceased owner of the land and the machinery fixed to it.

My Lords, I do not profess to be able to reconcile all the

(1) (1859) 7 C. B. (N.S.) 115.
(2) (1855) 5 D. M. & G. 403.
(3) 2 K. & J. 536.
(4) L. R. 3 Ex. 257; L. R. 4 Ex. 328.
(5) (1869) L. R. 5 Q. B. 123.
(6) L. R. 7 C. P. 328.
(7) [1894] 1 Q. B. 713.
(8) [1897] 1 Ch. 182.
(9) (1887) 37 Ch. D. 64.
(10) 6 Ex. 295.
(11) 32 L. T. 486.
(12) 18 Q. B. D. 81.
(13) 8 App. Cas. 195.
(14) [1902] A. C. 157.
(15) (1845) 12 Cl. & F. 312; 69 R. R. 97.

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cases on fixtures, still less all that has been said about them. In dealing with them attention must be paid not only to the nature of the thing and to the mode of attachment, but to the circumstances under which it was attached, the purpose to be served, and last but not least to the position of the rival claimants to the things in dispute. In this case, and still regarding the question for the present as concerning the mortgagor on the one side and the mortgagee on the other, it is in my opinion impossible to hold that the machines did not pass with the mortgage. The only authorities on mortgages which present any difficulty are *Trappes* v. *Harter* (1), and the very recent case of *Lyon & Co.* v. *London City and Midland Bank*. (2)

Trappes v. *Harter* (1) was a reputed ownership case, and turned on the facts stated in a special case. The Court there held that some trade fixtures did not pass by a mortgage of the property to which they were attached. The special case, however, stated facts shewing that the machines as fixed were locally regarded as chattels, that the partners who put them up so regarded them, and that the mortgagee knew this and so treated them. This accounts for the decision.

In *Lyon & Co.* v. *London City and Midland Bank* (2) some chairs were hired from the plaintiffs by the owner of a place of public entertainment in Brighton. The Brighton Town Council required the chairs to be fastened so as not to be easily displaced, and this was done. The chairs were screwed to bars fastened to the floor. The building and fixtures were then mortgaged to the defendants. The mortgagees took possession and claimed the chairs, but the Court held they did not form part of the property mortgaged, but remained so many chattels. Having regard to the nature of the things fixed, the mode of fixing, and the order of the town council, the decision was, in my opinion, quite right, and in accordance with the authorities above referred to.

I pass now to consider whether in this case the fact that the mortgagor Holdway had not acquired the ownership of the machines by paying for them entitles the appellant to recover

(1) 2 C. & M. 153.

(2) [1903] 2 K. B. 135.

their value from the defendants. The title to chattels may clearly be lost by being affixed to real property by a person who is not the owner of the chattels. This was pointed out in *Gough* v. *Wood* (1), and is very old law. Holdway agreed to buy the machines; but the appellant knew what he wanted them for, and that before paying for them he intended to put them up in his factory and to use them. The appellant knew that the factory was mortgaged, and ran the risk of the machines being claimed as fixtures. In effect, Holdway was authorized by the appellant to convert the chattels into fixtures, subject to the right of the appellant to enter and retake them if Holdway did not pay for them. But, apart from this knowledge and authority, the result would be the same, although not so obvious. After the machines were fixed, and before the appellant claimed them, the second mortgagee took possession; the appellant's right to enter and remove the machines, resting as it did on his contract with Holdway, ceased to be exercisable. The appellant has no greater rights against the defendants than he had against the second mortgagee, whose rights the defendants have acquired. The machines had ceased to be chattels belonging to the appellant; they were not chattels wrongfully detained by the defendants. The machines had become fixtures which the appellant was not entitled to remove from the possession of the mortgagees. This was the view taken both by Lawrance J. and by the Court of Appeal, and was in accordance with *Hobson* v. *Gorringe* (2), which, in my opinion, was correctly decided.

There were really no facts in dispute, and nothing would have been gained by leaving any question to the jury. The legal questions arising on the undisputed facts were, in my opinion, rightly decided, and the appeal ought to be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, August 5, 1904.

Solicitors: *Scott, Spalding & Bell; T. H. E. Foord.*

(1) [1894] 1 Q. B. 713. (2) [1897] 1 Ch. 182.

[HOUSE OF LORDS.]

H. L. (E.) 1904 Aug. 5.

SIMPSON . . . . . APPELLANT;

AND

ATTORNEY-GENERAL AND OTHERS . . RESPONDENTS.

Water Highway—River—Navigable Non-tidal River—Public Right of Navigation—Power to levy Tolls—Locks—Stanch—Royal Charter, Validity—Grant of Exclusive Passage for Boats, &c.—Implied Obligation to Maintain and Repair—Dedication—6 Geo. 1, c. 29.

Under letters patent in the seventeenth century the owner of land adjoining the river Ouse between St. Neots and St. Ives, which was there a public river navigable only in sections, made in his own land cuts from the river and locks in the cuts and took tolls from the vessels passing through the locks. In 1720 by 6 Geo. 1, c. 29, the then landowner was empowered to rebuild a stanch in the river below St. Ives and to repair and maintain it and to take tolls on vessels passing through it. Tolls were collected at the locks for more than 200 years and at the stanch for a long period by the predecessors in title of the appellant:—

Held, by Lords Macnaghten, James, and Robertson (Lords Davey and Lindley dissenting upon the question of a highway through the locks), that there was no evidence that the locks had ever been dedicated to the public as a highway, and that the appellant was not bound to maintain or repair or allow the public to pass through the locks or the stanch.

The decisions of Farwell J. and the Court of Appeal, [1901] 2 Ch. 671, reversed.

AN action was brought by the Attorney-General and the county council of Huntingdonshire against the appellant to establish the right of the public to pass through certain locks, and a stanch in the river Ouse. The evidence given at the trial before Farwell J., and the decisions of that learned judge and of the Court of Appeal, are set out fully in the report of the Court below and also in the judgment of Lord Macnaghten in this House.

March 15, 18 21, 22, 24; April 25; May 2, 9. *Neville, K.C.*, and *R. J. Parker*, for the appellant.

Upjohn, K.C., and *N. Tebbutt* (*Brooke Little* with them), for the respondents.

Neville, K.C., in reply.

The House took time for consideration.

Aug. 5. LORD MACNAGHTEN. My Lords, before the incident occurred which led to the present action, the navigation of the river Ouse between St. Neots and St. Ives, a distance of about sixteen miles, was maintained by means of six locks. Below St. Ives it was maintained by means of a lock built in a stanch stretching across the river, and situated about half a mile below St. Ives, where the passage of boats and vessels used to be impeded by shallows and "hills of gravel," and where the tide now ends. The six locks were constructed under the authority or under the cover and protection of certain letters patent in the early part of the seventeenth century by a predecessor in title of the appellant Simpson. He put them upon land of his own, which he had acquired for the purpose. By the use of these locks boats and vessels were enabled to pass from one level to another, and so to get round six ancient mill-dams which penned back the water, deepening the reach above, but forming an obstruction in the course and channel of the river and interrupting the waterway. The St. Ives stanch was originally constructed in the same century, but at a later date, by the then owner of the navigation for the benefit of the traders on the river, who agreed to pay a charge or toll on going through the stanch. It was afterwards dealt with by an Act of Parliament, passed in 1720 (6 Geo. 1, c. 29), which authorized one Henry Ashley, who was also a predecessor in title of the appellant Simpson, his heirs and assigns, to rebuild and improve the stanch, and then to take a toll over and above the toll due or payable before the Act was passed. The Act of 1720 also authorized and empowered Henry Ashley, his heirs and assigns, to improve the passage for boats and vessels on the river within the county of Huntingdon from a place called Hollowell, below St. Ives stanch, right away up to St. Neots, and for that purpose to cleanse, scour, and deepen the river where and as often as occasion should require.

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In the early days of the navigation after the six locks were built there was a good deal of trouble and litigation in connection with them, principally about the charges demanded from the traders on the river. Ultimately the charge or toll for passing through the six locks came to be settled at the uniform rate of 3*d.* per customary load at each of the six locks. Thenceforward until the introduction of railways the navigation appears to have been a profitable concern, and naturally enough no attempt was ever made to unsettle the toll. When railways were introduced, traffic on the river fell off, and the owners of the navigation had to lower the toll by allowing an increase in the weight or quantity of the customary load.

In the year 1893 the appellant Simpson bought the navigation. Everything was then out of repair. He paid several thousands for his purchase. He had to spend about 10,000*l.* more on the property to put it in order. But he soon found that there was little or nothing to be made of it. Trade on the river was dying out. At the same time there was a growing increase in pleasure traffic. But the owners of pleasure-boats protested against paying any toll, and evaded payment when they could. At last, in self-defence, Simpson took the step of shutting up the six locks and the stanch. Thereupon this action was brought. The Attorney-General at the relation of the county council of Huntingdonshire, and the county council of Huntingdonshire, came forward as plaintiffs. Simpson was made defendant. The plaintiffs claimed a declaration that the six locks and the stanch with their appurtenances formed part of the river Ouse, that the Ouse from St. Neots to the sea was a public navigable river, and that all members of the public were entitled to pass through the six locks and the stanch, but, as regards the passage of boats and vessels laden with goods or merchandise, subject to the statutory toll mentioned in the Act of 1720 in respect of the passage through the stanch, and subject to the toll of 3*d.* per customary load in respect of the passage through each of the six locks. They also asked for a declaration that the defendant was bound to maintain all the six locks and the stanch in an efficient state and condition, and to provide attendants and all appliances

necessary to work the same and to enable the public navigating the river to have free and convenient passage through the same, subject only in the case of boats laden with goods and merchandise to the tolls aforesaid. The plaintiffs also sought to have the rights which they claimed enforced by injunction.

Farwell J. decided that the Ouse, including the six locks, the stanch, and their appurtenances, was a public navigable river, and that all members of the public were entitled to pass through the six locks without paying any toll whatever, and through the St. Ives stanch on payment of the statutory toll in the case of boats and vessels laden with goods or merchandise; but he held that the defendant was not bound to maintain or work any of the six locks or the stanch, and he granted an injunction to restrain the defendant from obstructing or interfering with any of Her late Majesty's subjects in the exercise of their rights as thus declared. He gave no costs to either side.

The defendant appealed from the whole judgment, except from the order as to costs. The plaintiffs did not appeal.

The Court of Appeal differed from Farwell J. on many points of importance, and varied his order. As varied, the order is substantially in terms of the plaintiffs' claim, except that the tolls payable in respect of the six locks are declared to be "such tolls, rates, and charges as may from time to time be reasonable, that is to say, such tolls, rates, and charges as will from time to time provide a reasonable profit for the defendant beyond the necessary cost of repair and maintenance." As regards the six locks, the declaration of the Court is that the defendant is bound to maintain them in an efficient state and condition, and to provide attendants and all appliances necessary to work the same. As regards the St. Ives stanch, the declaration is that so long as the defendant takes the statutory toll in respect thereof he is bound to maintain and repair it, without prejudice to any question as to his obligations in respect thereof, in the event of his ceasing to take the statutory tolls. An injunction was granted to enforce the rights so declared, but no costs were given to either side.

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From the order of the Court of Appeal both parties have appealed to this House. The defendant appeals from the whole order. The plaintiffs seek to omit the words "such tolls, rates, and charges as may from time to time be reasonable," and to limit the toll to a toll of 3*d.* for each of the six locks. And they appeal against the order as to costs.

Pausing here for a moment, I would ask your Lordships to consider the practical effect and necessary result of the order of the Court of Appeal. The litigation, so far, has been disastrous to Simpson. The judgment of Farwell J. stripped him of every particle of beneficial interest in the six locks. But stripped and despoiled as he was he was yet allowed to go away scot-free. Not content with that privilege or immunity, he appealed to the Court of Appeal. There he fared worse. He is now under orders to repair, maintain, and work the locks, to keep a staff of attendants, and to provide all necessary appliances for the purpose. True, he may take reasonable tolls, such tolls as will "provide a reasonable profit beyond the necessary cost of repair and maintenance." I am sure the Court was serious. But where is the profit to come from? Pleasure-boats are to pay no tolls. The present tolls on goods and merchandise are not enough to keep the navigation open. Will raising the tolls attract traffic? Will the one or two traders who still use the river, partly, I think, in consequence of some squabble with the railway company, be persuaded to pay enough, not only to provide for repair and maintenance, but to yield a profit besides? I do not feel very sanguine about that. And if Simpson is ruined, how will the public be benefited? As a last resource he can assign to a pauper. If he does so the assignment will not transfer any of his rights, such as they are, to the public or to the county council. The locks will be left derelict, at the mercy of everybody and everything, and the whole concern will go to rack and ruin in a very short time. Is it not permissible to doubt whether a conclusion so lame and impotent, which must be disastrous to everybody concerned, is founded on sound premises?

The case was very fully and ably argued. Many interesting topics were introduced. The history of the Ouse was carried

back to Domesday Book. We had glimpses of men famous in their day. The lord of Kent, the Abbot of Ramsey, with his "cruel and furious mind," and several relatives of the great Protector were brought on the scene. And there was a copious citation of authorities. But, after all, I think the real question before your Lordships lies within a comparatively narrow compass of time and depends upon a few simple considerations.

As regards the six locks, one has first to consider the state and condition of the river Ouse between St. Neots and St. Ives at the date of the letters patent under which the six locks were constructed. These letters patent were granted in 15 Jac. 1 (July 21, 1618) to one John Gason, and are known as Gason's patent. Gason's patent was for the term of twenty-one years. While that patent was in existence there were divers proceedings before the Privy Council. There was also a suit of *Thelwall* v. *Jackson*; there was an action of *Juxon* v. *Thornhill* (1); and there were two other patents, one of 3 Car. 1 (January 3, 1628) called Spencer's first patent, and the other of 14 Car. 1 (December 11, 1638) known as Spencer's second patent. The events which took place during this period are material and require close attention. I do not think it necessary either to go into the earlier history of the river Ouse or to trouble your Lordships by dwelling on what occurred after the toll of 3*d*. per customary load for each of the six locks came to be recognised as the regular charge. Just as one would expect, so long as the navigation was profitable nobody thought of disturbing the accustomed toll, and, indeed, very soon the circumstances under which the toll originated were quite forgotten. In later times we find its origin attributed sometimes to statute, sometimes to immemorial usage, and sometimes to one of the three patents, which does not even purport to create a toll.

Farwell J. found—and with Stirling L.J. I accept his finding—that at the date of Gason's patent the river Ouse between St. Neots and St. Ives was a public navigable river, not indeed throughout, but in sections or in a succession of reaches from mill-dam to mill-dam. In ancient times the river was probably

(1) (1629) Cro. Car. 132.

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a public stream, navigable throughout for such boats as were then used. This seems to be proved by ancient records, and is not, I think, disproved by the modern state of the river, which must have been greatly altered by the draining of the fens.

By Gason's patent the patentee (who represented that he had invented a method of making locks, sluices, bridges, cuts, cranes, and mill-dams for grinding corn, raising water, and making rivers navigable and passable) was authorized to practise and use his invention in any rivers within the realm for the period of twenty-one years, and to take for his own use without let of the King whatever contribution, composition, advantage, and commodity might be agreed or consented to be paid in respect thereof. There was a proviso enabling the King to revoke the patent if, upon examination had before six or seven of the Privy Council, they should declare in writing that the patent was inconvenient to the realm.

Gason assigned his patent to Spencer and Girton—Spencer, having become by survivorship sole owner of the patent, assigned it to John Jackson—and before 1625 the six locks between St. Neots and St. Ives were constructed by Jackson alongside the six mill-dams in the manner I have described.

Now what was Jackson's position with regard to these six locks? They were his own private property and constructed on his own land. But in order to work them it was necessary to make cuts from the river. The river was the King's highway and under his care and protection. No cut or diversion could be made without the King's licence. These cuts were sanctioned for the public good, for the promotion and encouragement of trade. The effect of sanctioning them was to confer on the patentee a virtual monopoly in regard to the navigation of the river, not only during the life of the patent, but so long as the condition of things remained unchanged. The result was, I think, according to the doctrine of Lord Hale, that these locks, although private property, became "affected with a public interest" and ceased "to be juris privati only." Consequently the owner, if he worked them for his own profit, could not make either an arbitrary or an excessive charge. As Lord

Hale points out, "the duties must be reasonable and moderate though settled by the King's licence or charter": Hale, De Portibus Maris, Part II., chap. 6; Hargrave's Tracts, I., p. 77, cited in *Allnutt* v. *Inglis*. (1) And, further, so long as the private owner kept the locks open and took toll, all members of the public belonging to the class for which they were made were entitled to free passage on paying the regular charges. Such, I think, are the respective rights of the private owner and the public in a case like this. And if you think of it, the public can require nothing more for its protection. It is absurd, as it seems to me, to order a man who is the owner of a mechanical contrivance to go on working it for the benefit of the public if the working is expensive and if it can only be worked at a loss. You may be sure he will get rid of his property altogether if there is no other way of getting rid of the burden attached to it.

Very soon after the locks were constructed complaints were made to the Lords of the Privy Council, founded probably on the proviso for revocation contained in Gason's patent, to the effect that Jackson was oppressing the country by taking unreasonable tolls. The Privy Council held several meetings and made various references with the view of arranging matters, but their proceedings as a board of conciliation ultimately came to nothing.

Next in order is Spencer's first patent. I do not think I ought to delay your Lordships by referring to its terms, because the Court of Appeal came to the conclusion, and I think rightly, that there were so many difficulties about it that it might be put aside altogether. In this view the counsel on both sides agreed. It was never put in use. The King's rent reserved by it was never paid. And Spencer, to whom it was granted, seems to have had nothing to do with the Ouse when the grant was made. Farwell J. seems to have thought that Spencer's first patent created a toll. But, if the point is worth noticing, I think it will be found that it does not purport to create a toll, but to put a limit on the charges to be taken by the patentee. That limit was not 3*d*. per customary load for each lock, the

(1) (1810) 12 East, 527, 539; 11 R. R. 482.

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amount which was then or soon afterwards established or regarded as the regular charge, but 3*d.* per ton of the vessel's burthen, which might produce a very different result.

Then comes the suit of *Thelwall* v. *Jackson*. On behalf of certain traders and watermen it was sought to have the tolls and charges in respect of the six locks fixed in accordance with an order of the Earl of Manchester, the Lord-Lieutenant of the county, to which it was alleged Jackson and the traders had submitted. In the course of the suit a decree was made fixing a scale of charges in accordance with the report of a commission of the justices of the county of Huntingdon, which it was thought would give Jackson 160*l.* a year. The decree reserved further consideration in the event of the receipts as certified by the justices falling short of that sum.

By an order made in *Thelwall* v. *Jackson* and dated June 18, 1632, it was declared that the decree in the cause was made for the public good, and that as to the rates the same were granted on the opinion of the Earl of Manchester and the justices, that the same would be sufficient to reimburse Jackson his money in convenient time, howbeit experience had shewn that the same had fallen and would fall much too short, and "it was never the intention of the Court by providing for a public good to ruin Jackson in his estate, more especially since every man was at liberty to carry by land carriage or otherwise as was theretofore used if they would not come up to the rates at which Jackson could offer it"; and on Jackson's suggestion it was further declared that if any would enter into a treaty to take the same off Jackson's hands, Jackson should leave the same, but if no one would undertake the same in a reasonable time the Court declared that it "saw no other way but to leave Jackson to make the best thereof."

No one it seems came forward to take the concern off Jackson's hands; so, ultimately, by an order dated February 16, 1632, Jackson was left, in the words of the order, "to go on with the work and make what he can thereof."

I do not propose to dwell on the action of *Juxon* v. *Thornhill* (1), which began and ended while *Thelwall* v. *Jackson* was

(1) Cro. Car. 132.

pending. "Juxon" was no doubt Jackson, the maker and owner of the locks. The case does not, I think, carry the matter any further. It goes to shew that the locks were on Jackson's own land, but that fact is not disputed now. It also goes to shew that Jackson, so long, of course, as his demands were reasonable, was free to bargain with the traders on the river for passage through the locks. That, again, is just what Gason's patent contemplated, and what the Privy Council and the Lord Keeper left Jackson at liberty to do.

I now come to Spencer's second patent, 14 Car. 1. I must ask your Lordships' careful attention to this document, because the judgment of the Court of Appeal is, as it seems to me, founded entirely upon their view of its meaning, or rather, I should say, upon their conception of what its meaning would or might have been if the patent in question had been expressed differently. I do not propose to set out all its provisions at length. It has been read more than once, and your Lordships, I think, are familiar with it. Whatever its effect may be, the language, I think, is absolutely clear. It is frank—I might almost say blunt—in its audacious defiance of statute law, and common law too. Spencer besought the King to grant to him, his heirs and assigns, "the sole and absolute benefit of all and singular the water carriage in and upon the said river of Owse from the said town of St. Ives to St. Neotts aforesaid." And the King granted to Spencer, his heirs and assigns, "the sole and exclusive passage and transit for boats, barges, and other vessels laden with corn, coal, and all other goods and merchandise through all that river or trench of Owse aforesaid leading from the town of St. Ives aforesaid to the said town called St. Neotts." The King also granted to Spencer, his heirs and assigns, that he, his heirs and assigns, from time to time in perpetuity might and should "have thenceforth for the future the sole and exclusive licence and power of carrying and recarrying, transporting and retransporting, in and through all the river aforesaid from the said town of St. Ives aforesaid to the said town called St. Neotts . . . . all and all manner of food, coal, goods, and merchandise whatsoever in ships, boats, barges, and

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other vessels ascending or descending." For this exclusive privilege or monopoly Spencer, his heirs and assigns, were to pay the King the yearly rent of 6*l.* 13*s.* 4*d.* No one else was to "presume to enter on or navigate" the river. In case of default in payment of the rent of 6*l.* 13*s.* 4*d.*, the King was to have a power of distress over all the boats, barges, and vessels "in or upon the said river being or to the said river . . . . belonging or appertaining." Is there any ambiguity in that language? Is it possible that it can have any meaning but that which is expressed so clearly on the face of it? Farwell J. held the patent void. Vaughan Williams L.J. thought that it was "a good charter," and that it was based "on the assumption that the grantee would suffer all the King's subjects to have in perpetuity the benefit of that franchise of navigation which had been granted to him and his heirs in perpetuity." I confess I have some difficulty in following the learned Lord Justice. Why should a man who has paid for and obtained an exclusive privilege be expected to communicate it forthwith to all the world? That would be a remarkable instance of conduct which it is the fashion nowadays to call altruism, and all the more remarkable because the owner of the locks was evidently an unpopular character, and it would have only been human nature to conciliate opposition by publishing abroad so disinterested an action instead of doing good by stealth and hiding generosity to the public under the cloak of selfish exclusiveness. However, a similar view was taken by Stirling L.J. He held that Spencer, the defendant's predecessor in title, "by applying for and putting in use the charter of 14 Car. 1" (which in point of fact he never did or attempted to do), "gave the public a right to resort to the locks and sluices which were his property." Now I must say that I think it is impossible to attach any meaning but one to the charter of 14 Car. 1. I think that this charter was absolutely void. It was void by the Statute of Monopolies which had been passed in 1623 (21 Jac. 1, c. 3). If Spencer or any of his successors had attempted to put it in force, he or they would have been liable to serious penalties. Apart from the Statute of Monoplies the charter was, I think, absolutely void at common law. The

King has the care and protection of all highways by land or by water. It is his province, as Lord Hale says, in reference to this matter "sustinere personam vindicis et tutoris jurium publicorum." It sounds better, perhaps, in a learned language than in the vulgar tongue, but the meaning is the same. It is impossible that the champion and guardian of public rights should sell them in the gross to a private individual for 6*l.* 13*s.* 4*d.* a year. Upon this very ground the Court of King's Bench in *Williams* v. *Wilcox* (1) declared that a charter, whether before or after Magna Charta, authorizing the erection of a weir across a navigable river was utterly void at common law. As far as I can discover, no similar patent has ever been upheld even in the worst days of the Stuarts. I trust your Lordships will not make a precedent now under the impression that this patent has been put in use. The King's rent has been paid ever since the date of the patent, but the patent was never put in use by the patentee or anybody claiming under him. Nothing has ever been done from first to last which can possibly be attributed or referred to the rights and privileges which the King's grant as expressed in the patent, however construed, purports to confer.

In this connection I ought perhaps to notice in passing an argument in favour of the validity of Spencer's second patent, which is alluded to apparently without disapproval by Stirling L.J. It seems that about fifty years after the date of Gason's patent there was litigation between persons claiming under Spencer as to their rights inter se in the profits of the navigation. The litigation has no bearing on the question now before your Lordships. There were two suits, *Jemmatt* v. *Ashley* and *Jemmatt* v. *Ashley, junr.* It seems that the bill of complaint in each case began by stating Spencer's second patent, and referred to it as the origin of the toll and the authority under which the locks were constructed. It was alleged on the other side that the patent was void in law and never put in use. Ashley, junr., said he should be only too glad if it could be put in execution—he would be "a considerable gainer." It was immaterial for the purposes of these

(1) (1838) 8 A. & E. 314, 333; 47 R. R. 595.

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suits what the origin of the toll was; it was quite immaterial whether Spencer's second patent was good or bad; but from this casual and incidental reference to Spencer's second patent the Court in the present case was asked to draw the inference that the patent had received judicial recognition and a sort of judicial confirmation. Such an argument hardly requires a serious answer. Then some selections from depositions made in those cases were put in. How they can be evidence in the present case I do not quite understand. But both parties treated them as admissible. If they are admissible they seem to me to confirm the view I am presenting to your Lordships. They shew that Spencer's second patent was never put in use, that the river was free to all the King's subjects, and that boats carrying merchandise were entitled to use the locks paying the regular charges. But these charges I think were not made in respect of a "toll thorough," or a "toll traverse." If Lord Hale's view is accepted they were made in respect of the use of a mechanical contrivance—the water-lift of the lock chamber—belonging indeed to a private individual, but, to use Lord Hale's words, "affected" in the hands of the private owner "with a public interest." That, I think, was Mr. Neville's very able argument, and I agree in it.

Now, my Lords, it appears to me that if your Lordships agree with Farwell J. as to the invalidity of Spencer's second patent it is not necessary to say anything more about it; but if for any reason a different view should be entertained, I would ask your Lordships to bear in mind two things which are quite plain on the face of the patent. In the first place, the patent does not create or purport to create a toll. It does not continue or purport to continue a toll. It does not even contemplate any toll being paid. The whole waterway—all the water carriage—was to be Spencer's. Every boat, barge, or vessel on the river within certain limits was to be in the hands of Spencer, his heirs and assigns. No man takes a toll from himself or wants the power of distress (which is incident to every legal toll) over his own property. In the next place, there is nothing to be found in the patent about repairs or maintenance. The consideration on the part of Spencer as

expressed in the patent is not what he was going to do, but what he had done—his "great costs and expenses in carrying out these works."

It may be asked, what is the meaning of this patent if it is so plainly void on the face of it, and if it was never intended to be put in force according to its tenor? I think the meaning of the patent is not far to seek. It appears from the certificate of the Earl of Manchester, who made a report to the Lord Keeper in the suit of *Thelwall* v. *Jackson* on February 13, 1632, that there had grown up a strong feeling of opposition and dislike to Jackson and his works. His opponents professed to be moved by zeal for the King's interest. The Earl declared that he opposed the passage of boats as well for the cause of other men as for his own interest, but principally for preserving the King's right. He was told, he said, by the tenants of divers mills that if the passage be suffered to continue "the mills will be quite decayed, and the King's rent lost." Obviously the best way of getting rid of this opposition was to procure some instrument manifesting the favour and countenance of the King. I have no doubt that this patent, though never intended to be put in execution according to its terms, was worth to Spencer a great deal more than he was to pay for it.

Now I would ask your Lordships to consider the grounds on which the Court of Appeal held the appellant Simpson bound to repair and maintain the locks whether he took toll or no. Their view, if I may say so with all deference, seems to me to be founded on a mistaken analogy and on a mistaken view of the true nature and character of such a mechanical contrivance as locks on a waterway. There is nothing in the language of Gason's patent or in the language of Spencer's second patent imposing on the owner of the locks any liability in respect of repair or maintenance. There is nothing in the books recognising such an obligation in any case bearing any resemblance to this. The learned judges of the Court of Appeal admit, I think, that there is no authority to be found in support of their view. But they say in effect, "The rights conferred by Spencer's second patent as we construe it are

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very like a right of ferry. A right of ferry imposes on the grantee the obligation of maintaining the ferry. It follows, therefore, that the owners of these locks are bound to keep them always ready for the public service." Now, with the utmost deference to the Court of Appeal, I cannot see the slightest analogy between the right which Spencer's second patent purported to confer on the patentee and the right to an ancient ferry. If you construe the patent according to the plain meaning of the language used no two things could be more dissimilar. But even upon the view of the Court of Appeal of what the effect of the patent is or ought to be I cannot see any analogy. All ancient ferries have their origin in Royal grant or in prescription, which presumes a Royal grant. A right of ferry is in derogation of common right, for by common right any person entitled to cross a river in a boat is entitled to carry passengers too. Within the limits of an ancient ferry no one is permitted to convey passengers across but the owner of the ferry. No one may disturb the ferry. The ferry carries with it an exclusive right or monopoly. In consideration of that monopoly the owner of the ferry is bound to have his ferry always ready. But there is nothing of that kind here. No one is bound to pay for the locks except the person who uses them. Anybody may make other locks or other contrivances for getting past the mill weirs. And, after all, as the Lord Keeper very justly observed, if the traders will not come to the terms at which the owner of the locks can afford to offer the accommodation he has provided, they are no worse off than they were before. If they take their goods by road or draw them over the mill weirs or pass them through the mill sluices, as seems to have been done occasionally in former times, they are not asked to pay anything for facilities and conveniences which they do not care to use. Why then should the owner of the locks, if it does not pay him to keep them up, be "grievously amerced" like the owner of a ferry who puts the public to inconvenience by failing to perform the duty which he has undertaken and which no one else may perform?

Then it was said, "This state of things has gone on so long

that it must now go on for ever. True, the owner of the locks has been acting all along in his own interest as well as for the benefit of the public. He had to maintain the locks to enable him to earn his remuneration. Now that no remunerative toll can be got he must go on maintaining them for the benefit of other people and to his own loss. If you cannot evolve the obligation from any one of the three existing patents, you must presume a lost patent to fit the circumstances of the case. If you cannot presume an appropriate patent"—and I venture to say that no such patent is to be found in the books, for the charter in the *Mayor, &c., of Lyme Regis* v. *Henley* (1) was a very different case—"you must presume a lost Act of Parliament. You may put in it what you like, and then there is an end of the defence." It is quite true that the Court will go almost any length to support a right openly asserted, long continued, and never before contested if it can find any legal origin for such a right. But the converse does not hold good in the case of a burthen, however long it may have been borne. I took the liberty of asking the learned counsel for the respondents if he had any authority for making a presumption in favour of the legal obligation of an immemorial burthen, and he admitted that no such authority was to be found. There is authority the other way. In the great case of gleaning, *Steel* v. *Houghton* (2), Heath J. says: "If A. and his ancestors have from time immemorial repaired a bridge or a highway, there is no obligation on him to continue the repair unless he is so bound by the tenure of lands or the like."

The matter that lies at the root of the difference between the view of the Court of Appeal and the view that I have endeavoured to express may, I think, be shortly summed up in this question: What is the real nature and character of these locks? How are they to be regarded? Are they really part and parcel of the highway, or are they nothing more than a mechanical contrivance worked by water drawn from the river for the purpose of transporting boats and vessels from one level of the waterway to another—up or down, as the case may be? The Court of Appeal regards the cuts as the principal and the

(1) (1834) 2 Cl. & F. 331; 37 R. R. 125. (2) (1788) 1 H. Bl. at p. 60.

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locks as merely accessory to the channel of the cuts. I regard the cuts as ancillary to the locks and the locks as the principal. As a mechanical contrivance for surmounting differences of level in the waterway, which was the whole object of the original patent, I can see no real difference between locks and any other mechanical contrivance for the same purpose, as, for instance, an inclined plane or a hydraulic lift—the most ancient and the most modern, I think, of all such contrivances.

If it were necessary to consider the position and the rights of pleasure-boats, I am afraid I should differ from the Court of Appeal on that point also. Obviously at the time that the locks were made pleasure-boats were not within the contemplation of the patent or the patentee. In my view of the case it is not necessary to consider the position of owners of pleasure-boats at all. I do not think they can be held to have established a right for themselves as a separate class of the public. That sort of traffic, as everybody knows, has only come into vogue in recent years. Mr. Bateman-Brown, who was a witness on behalf of the plaintiffs, admits that when he first had a pleasure-boat there were but few others on the river. "As people grew richer," he says, "boats increased," and then he added, "It never has been worth while collecting tolls on pleasure-boats." There was no charge for pleasure-boats in the list or schedule of tolls, and I should think that, at any rate until the scarcity of water which occurred some years ago, I think in 1868, a tip to the attendant, if there was an attendant at hand, was all that was expected from a pleasure-boat. At the locks, where there were no attendants, the persons in pleasure-boats could let themselves through or carry their boat round if it were a light one. Putting aside the fact that of late years, since 1872 at any rate, no pleasure-boat has been allowed to go through the locks without paying, the evidence satisfies me that the passage of pleasure-boats through the locks was a matter of indulgence and not a matter of right. It would have been a churlish thing to stop a pleasure-boat going through if it went through with barges, and if there were no barges going through at the time and there was no scarcity of water, I should think the owner of the locks in

former days would never have thought of objecting to the attendant making a trifle by opening the locks for a pleasure-boat. When dealing with this point allow me to remind your Lordships of what was said by Bowen L.J. in *Blount* v. *Layard.* (1) It was a case about a fishery, and it was alleged that the person claiming a several fishery must have been very careless in stopping people from fishing if he had a right to do so. There was to be a retrial. "If the case is retried," said the learned Lord Justice, "the jury ought to be most carefully warned . . . . not to do injustice under the idea that they are vindicating a public right. I think they ought to be solemnly told . . . . that nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood."

Of course, if I am wrong in my view, and if these locks are, as the Court of Appeal have held, a public highway, and all and sundry not conveying goods or merchandise have a right to go through the locks without payment at their will and pleasure, and to call upon the appellant Simpson to have in readiness for their convenience or amusement a staff of attendants, and all necessary appliances, the owners of pleasure-boats may avail themseles of that accommodation in common with the rest of His Majesty's subjects. But that view, from which I altogether dissent, and which seems to me to be most unreasonable, is founded upon two propositions—(1.) that Simpson, the appellant, is bound to repair and maintain these locks whatever happens, and (2.) that Simpson's predecessor in title dedicated the locks to the public as a part of the river—that is, as a public highway. With the first proposition I have already dealt. As regards the second it is, I think, enough for me to say that it is clear law that a dedication must be made with intention to dedicate, and that the mere acting so as to lead persons into the supposition that a way is dedicated to the

(1) [1891] 2 Ch. 681, n.

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public does not of itself amount to dedication: *Barraclough* v. *Johnson*. (1) Here it is not alleged that there was any formal dedication. There very rarely is. There is nothing whatever—not a trace or scintilla of evidence—from which any jury could have inferred any intention to dedicate, nor would such a dedication be of the slightest advantage to the public, though it might be very detrimental to the owner of the locks. There are two circumstances which seem to me to go a long way to negative any intention to dedicate the locks to the public as a public highway. Whatever may have been the actual relations between Spencer and Jackson, Spencer must have known everything that was going on, and he must have known that it was only by reason of his private ownership of these locks that Jackson came unscathed through the ordeal of the Privy Council and escaped the perils of the Court of Chancery. It seems to me hardly conceivable that Spencer would have thrown away that advantage with a light heart the moment the property came into his hands. Then I rather doubt whether he would have been justified in dedicating the locks to the public. The making of the cuts which fed the locks was sanctioned by the King for the encouragement of trade, and it was no doubt for the sake of trade in which they themselves benefited that the mill-owners submitted to the loss of water withdrawn by the locks. I rather doubt whether it would have been competent for the owner of the locks, considering the end and purpose of their existence, to dedicate them as a highway to the public, and so give everybody, whether a trader or not, a right to diminish or interfere with the water power of the mills.

Then comes the question, which is really the question in the action, Was the appellant Simpson, if under no obligation to repair and maintain the locks, justified in closing them altogether? In my opinion he was. I think he was bound to close them, both for his own protection and as a matter of duty. It must be borne in mind that although he leaves the locks derelict he does not thereby divest himself of his property therein. If they go to rack and ruin and get worse and worse,

(1) (1838) 8 A. & E. 99; 47 R. R. 506.

still I have no doubt that people will use them so long as they can be used. Some day perhaps an electric launch may try to go through and get wrecked, and then I should imagine there would be promising materials for an action against the owner of a dangerous structure which had come to be a trap for those who are invited by gates, left open or capable of being opened, to pass through. I do not see how the appellant Simpson can make himself perfectly safe except by shutting the locks up. But I go further. I think the licence of the King to make these cuts or diversions was obtained on the faith that the water so diverted would be used for working the locks, and that it would not be allowed to run to waste. Now, if the locks are no longer kept in repair and no longer used as they were intended to be, I think it becomes the duty of the owner of the locks to take care that there is no flow of water through the cuts.

The stanch below St. Ives stands on rather a different footing. I think it may be disposed of very briefly. The Act of 1720 is, I think, merely permissive. In railway Acts similar words are found, and even larger powers are given. But it is now clearly established that railway Acts and Acts of that class, although they are intended to serve a public purpose, and although undertakers are authorized to take toll from the public, are merely permissive. No authority to the contrary can be produced. I think the Act of 1720 is no more obligatory as regards repairing the stanch than it is as regards cleansing, scouring, and deepening the river all the way up to St. Neots, where and as often as occasion requires. And I think that if the appellant Simpson ceases to take toll at the St. Ives stanch and ceases to repair the lock, he is justified in shutting it up, and, indeed, bound to do so. The result may be that when the lock is permanently closed the St. Ives stanch will come to be a nuisance, and possibly the appellant Simpson may be answerable for keeping it as a nuisance in the river. That, however, is not the question in this action.

One word more. If this navigation is worth maintaining—whether it is or not I do not know—but if it is, it seems tolerably plain that statutory powers must be obtained and the

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navigation placed under the management of a public body. It cannot succeed in private hands, and no decree of any Court can make it work.

I think this action is misconceived. Whatever the result might have been, whether the view of Farwell J. or of the Court of Appeal or of your Lordships prevail, this litigation could not have been of any practical benefit to the county council of Huntingdon or the towns on the Ouse.

I move your Lordships that Simpson's appeal be allowed, and the plaintiffs' cross-appeal dismissed and the action dismissed, and that the plaintiffs do pay to the appellant Simpson his costs both here and below, including the costs of the cross-appeal.

My noble and learned friend Lord Robertson, who is engaged on the Judicial Committee of the Privy Council this morning, desires me to say that he concurs in the motion I have made and for the reasons I have given.

LORD DAVEY (read by Lord James). My Lords, the facts about which there is no dispute in this case are that for a period of time, certainly exceeding two centuries, the owners of the six locks on the river Ouse between St. Ives and St. Neots have maintained those locks in a proper state of repair for the purpose of navigation, and barges and other boats have been in use to pass through the locks at will, paying only to the owners of the locks a maximum toll of 3*d.* for every ton of goods laden on such barges and boats at each lock, subject to this exception, that from the year 1868 certain charges have been made upon pleasure-boats passing through the locks, which Farwell J. finds have been usually paid. Certainly these charges on pleasure-boats were not invariably paid, and on the evidence I should not myself have found the fact in language quite so favourable to the appellant Simpson, the present owner of the locks.

By the decree of Farwell J., dated November 21, 1899, it was declared that the six locks in question, as also a certain stanch below St. Ives Bridge, formed part of the river Ouse, and that the river was a public navigable river, open and free

for all the King's subjects to pass and repass as of right with boats and barges, laden or unladen, as regards the six locks, without payment of any toll, charge, or imposition whatsoever, and, thirdly, that the defendant Simpson was not under any liability to maintain or work any of the six locks or stanch. By the judgment of the Court of Appeal, dated August 9, 1901, it was ordered that the second declaration be varied by declaring that as regards the six locks the public right of passage was upon payment in the case of boats and barges laden, but of no other boats, barges, or vessels, of such tolls, rates, and charges as may from time to time be reasonable (that is to say) of such tolls, rates, and charges as will from time to time provide a reasonable profit for the defendant beyond the necessary cost of repair and maintenance; and it was ordered that the defendant was bound to maintain the six locks and provide necessary attendants and appliances. The case comes before your Lordships on cross-appeals. Mr. Simpson, the appellant in the first appeal (whom I will hereafter refer to as the appellant), contends that the six locks and the cuts in which they are situated are not part of the public navigable river, but are his private property, for the passage through which he is entitled to make such charges as he may think fit, and that he is under no liability to maintain them or keep them open for the passage of any boats or other vessels. The Attorney-General and the county council of Huntingdon (whom I will hereafter refer to as the respondents) by their appeal seek to substitute a toll of 3*d.* per customary load, as defined in the statement of claim, in respect of the passage through each lock for the reasonable toll allowed by the Court of Appeal. The question of the stanch below St. Ives Bridge is a separate one, depending on different considerations from those affecting the six locks, and will be dealt with by itself.

The questions as to the right of the public (if any) to use the six locks, and the terms (if any) upon which they are entitled to use them, depend largely upon the proper construction of and the effect to be given to three patents of the Crown, namely, a patent 15 Jac. 1, referred to as Gason's patent, of which the date is July 21, 1618, a patent of 3 Car. 1,

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referred to as Spencer's first patent, the date of which is January 3, 1628, and a patent of 14 Car. 1, referred to as Spencer's second patent, the date of which is December 11, 1638.

At the time of the execution of the works constructed under the powers of Gason's patent, the Ouse appears to have been divided into reaches or sections by mill-dams placed across it at intervals, so that there was no uninterrupted waterway from St. Ives to St. Neots. Farwell J. has found that there was a public right of navigation over the several sections of the river between the mill-dams. Goods were portered or "backed" across the mill-dams, and in some cases perhaps the boats were drawn across also. The Court of Appeal agreed with this finding, and I believe that your Lordships also agree. There is some evidence that the Ouse was originally a public navigable river throughout, and the mill-dams were placed there in infringement of the common right. But whether this was so or not it is unnecessary to determine. By Gason's patent the King purported to grant to the patentee power for his own benefit in any lands or rivers in England, for the term of twenty-one years from the date of it, to make locks, sluices, and cuts for (amongst other things) making rivers navigable and passable, and to receive any contribution, composition, advantage, and commodity which any of the King's subjects might consent to pay in respect of the making of the same, and also to receive any profit which might accrue by reason of any vessel passing upon the rivers, cuts, passages, streams, or waters so to be cut, made navigable, or perfected as aforesaid; and other persons were prohibited from putting in use the patentee's invention during the term. Powers were given to the patentee to take land which, though expressed in large terms, did not, I think, amount in law to more than a power to take land by agreement. A rent of 40*s.* was reserved to the Crown, and power was given to the Privy Council to revoke the patent if it should be found inconvenient to the realm. The benefit of this patent became vested in two persons named Girton and Spencer, and subsequently by survivorship in Spencer alone.

My Lords, it humbly appears to me that the discussion of the question whether Gason's patent was anything more than an inventor's patent is somewhat academic. It was granted before the passing of the Statute of Monopolies (21 Jac. 1, c. 3), and it is not regulated or confined in its effect by any statutory provisions. It must be construed, and full effect must be given to it, as a charter granted by the King by virtue of his prerogative. The diversion of a public navigable river by cuts or trenches would be a nuisance: Hale, Part I., chap. 3; unless duly authorized in consideration of some benefit to the public.

The powers of the patent were put in force on the river Ouse. Before the end of the year 1625 the six locks in question had been constructed (it is stated) by Spencer and Jackson, and the river was thereby made passable for boats from St. Ives to St. Neots: see Ord. P. C. 5th Dec. 1625. The locks were constructed on land purchased or, in the case of the Godmanchester lock, leased from the corporation of that town, and cuts were made round the heads of the mill-dams, into which the water from the river was diverted. Complaints were made to the Privy Council of the unreasonable charges made by Spencer and Jackson on goods passing through the locks, or (as they are called) sluices, and after an inquiry directed to, and certificate made by, certain justices of the peace of Huntingdon and Bedford, by an order of the Privy Council of October 29, 1626, it was ordered that the undertakers should receive upon every ton, wain, or cartload that should pass through the sluices, 18*d.*; that is, for every sluice 3*d.* the ton, wain, or cartload between St. Ives and St. Neots. This order, however, did not settle the disputes. Other proceedings took place before the Privy Council, in which Jackson alone is named as the person interrupting the passage of the river by his unreasonable demands, and by an order of February 11, 1628, it was ordered that such competent rate or toll as should be agreed on by the Lord Privy Seal or the justices of the peace at their sessions should be paid, or otherwise that the county, if they thought it beneficial for the public, might take the work into their own hands, satisfying Jackson.

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It appears that in pursuance of this order the Earl of Manchester, the Lord-Lieutenant of the county and also Lord Privy Seal, fixed $2\frac{1}{2}d.$ a ton at every sluice as a reasonable toll for Jackson to take on goods passing through his locks.

My Lords, I have troubled you with a statement of these proceedings in the Privy Council because they appear to me to shew in the clearest manner the construction which was placed by all parties at that date on Gason's patent, and throw some light on the subsequent events. The Privy Council derived their jurisdiction to fix a reasonable toll to be paid by the owners of vessels passing through the locks from the power reserved to them of revoking the patent if it should be found inconvenient to the realm. On the other hand, the amount determined by the Privy Council was not binding on the owners of the patent, or on the traders, or on a Court of law, though the owner of the patent would disregard it at the peril of having the patent revoked. The important point is, that all parties assumed and acted on the assumption that Gason's patent conferred on the patentee or his assigns the right to take a toll of a reasonable amount from the vessels passing through the locks, and in fixing that amount regard was had to the expense of maintaining the locks. No question, however, was raised as to the right of the public to use the locks on payment of a reasonable toll.

In Hale, De Jure Maris, Part I., chap. 3, it is said: "But if any person at his own charge makes his own private stream to be passable for boats or barges either by making of locks or cutts or drawing together other streams; and thereby that river, which was his own in point of propriety, become now capable of carriage of vessels, yet this seems not to make it juris publici, and he may put it down again or apply it to his own private use." And after mentioning certain ways in which such a stream may become publici juris, the author adds: "So likewise if he purchaseth the King's Charter to take a reasonable toll for the passage of the King's subjects, and puts it in use, this seems to be devoting, and, as it were, consecrating of it to the common use. . . . For no man can take a settled or constant toll even in his own private land for a common passage

without the King's license." This seems to me to be good law and good sense, and to be supported by the passage which was quoted from 2 Rolle's Abridgment, fo. 171, tit. Prerogative le Roy, par. D. I think it probable that the cuts made and locks constructed in exercise of the powers of Gason's patent became and were in law part of the navigable river and a common passage, which all the King's subjects had the right to use on payment of a reasonable toll on passing through the locks. If this were not so, it is difficult to see what consideration the public received for the authority conferred on the patentee to divert the water from the river, which was in law a nuisance. But in the view which I take of the effect of Spencer's first patent, I do not think it necessary to rely on this point.

The case of *Thelwall* v. *Jackson* in the Court of Chancery, on which the appellant placed so much reliance, and the case of *Juxon* or *Jackson* v. *Thornhill* (1) in the King's Bench, in my opinion lead to no certain conclusion. In the former case your Lordships have not got the bill of complaint, but it appears to have been a claim for a free passage by traders on payment of a certain toll fixed by the Earl of Manchester. Nor is it quite clear from the proceedings in evidence what Jackson's defence to the suit was. After various attempts by the Court (which apparently would have been extra cursum curiæ unless the public had a right of passage) to settle a reasonable toll by reference to justices and others, and proposals for purchase of the rights by "the country," and for repurchase of them by Spencer, which came to nothing at that time, the Court ultimately dissolved an interim order which had been granted that Jackson should suffer a free passage at 1*s.* 3*d.* a ton for all goods, and left Jackson to go on with the work and make what he could of it. In the language of modern times, the Court seems to have held there was no equity to support the bill, and left Jackson to his remedy at law. But there was no decision that there was not a right of free passage.

Spencer's first patent dated in 1628 contains two separate grants. It proceeds on the recital that the river Ouse had

(1) Cro. Car. 132.

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been made navigable by the order and at the expense of Spencer, and that he proposed to make other rivers navigable. The first grant is a general one, substantially in the same terms as Gason's patent, for eleven years from July 21 next ensuing, with a grant of all profits, commodities, benefits, and advantages to arise from vessels passing in or upon the rivers, cuts, passages, or sluices to be so cut or made navigable as aforesaid, but limited by reference to a charter granted by James I. to the corporation of Stamford to the rate of 3*d.* per ton for every vessel at every lock that it should go through according to the burden of such vessel. The second grant is of the benefit which Spencer might receive in respect of the river Ouse, and also any benefit which might accrue in respect of any river hereafter during the term aforesaid to be made navigable by Spencer, "according to the limitations and provisions before expressed," for the aforesaid term, and for a reversionary term of eighty years, paying an annual rent of 5*l.* to the Crown.

This term of eleven years would therefore expire on July 21, 1639, the same date on which Gason's patent would expire, and it cannot be doubted that this patent was granted on a surrender of Gason's patent, and, so far as the power of making rivers navigable by making cuts and constructing locks is concerned, it was in substitution for, and in confirmation of, the similar powers in the earlier patent. I think that by force of the words "according to the limitations and provisions before expressed" it granted to Spencer a maximum toll of 3*d.* per ton for each of the six locks on the river Ouse. There is no evidence of any disputes about rates after the date of this patent, or of any other rates having been demanded or received until the year 1851, when the toll was lowered to meet the competition of the railway. I understand Farwell J. to have found, with the acquiescence of both sides, that the toll of 3*d.* was paid and received from that date. I should myself draw the same inference from the documentary evidence. The Court of Appeal were of opinion that this patent was never put in force. Their grounds for so holding are that Spencer was not the owner of the Ouse navigation at the date

of the patent, and that there is no evidence of the rent of 5*l.* to the Crown ever having been paid. Reference was also made to the Statute of Monopolies which had then been passed. But it will be observed that Spencer's patent does not purport to extend the inventor's monopoly beyond the term of Gason's patent. We do not know the exact relations which existed between Spencer and Jackson. The latter is not shewn to have had any interest in Gason's patent, except as regards the Ouse navigation. And I think that a fair inference from the facts and documents in evidence is that Spencer remained and was the owner of Gason's patent, and Jackson was his licensee or holder from him of some derivative interest confined to the purpose of putting it in force on the Ouse. If so, I suppose Spencer was the proper person to surrender Gason's patent and receive the new patent in substitution for it, with the consent of Jackson, which may be presumed. I am of opinion that the reasons given by Stirling L.J. are insufficient for holding that Spencer's first patent was not put in use; and in fact, if the finding of Farwell J. that the 3*d.* toll was paid from the date of it be well founded, as I think it is, it is difficult to say that it was not put in force. I think it is at least a plausible inference that Spencer's first patent gave effect to a compromise which had been come to between Spencer and Jackson and representatives of the traders and the county for settling the disputes between them as to rates which the Privy Council and the Court of Chancery had failed to settle.

Farwell J., on the other hand, thought that Spencer's second patent, dated in 1638, had never been put in force. In opposition to this view reliance is placed on the facts that the rent of 6*l.* 13*s.* 4*d.* reserved to the Crown has been regularly paid by the owners from time to time of the locks from the date of the patent to the present time, and that the patent was put forward as the foundation of the plaintiff's title to the tolls in both suits of *Jemmatt* v. *Ashley*. I am not disposed under the guise of construing the patent to give the language of this patent a meaning which the words will not bear. But I think that if the words are susceptible of a construction which will support

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and shew a legal origin for the usage proved it ought to be adopted, although it may not be in accordance with the primâ facie or obvious meaning of the words used.

The patent (which I think was intended to operate as a surrender of Spencer's first patent) commences with a recital that by virtue of Spencer's first patent Spencer had extended the navigation from St. Neots to within four miles of Bedford (for so I understand the recital, having regard to the existing facts), and that he was engaged in making another river, called the Stour, navigable. It purports to grant to Spencer, his heirs and assigns, "so much as in us lieth," firstly, the sole and exclusive passage for laden vessels through the Ouse from St. Ives to St. Neots, and thence to within the said four miles of Bedford, and so much further as Spencer, his heirs or assigns, should thereafter make the river navigable; secondly, the sole and exclusive right of carrying goods on the Ouse described in the same words; thirdly, the sole and exclusive government and disposition of all vessels navigating in and upon the river between the towns and places aforesaid; and, fourthly, all profits, commodities, pre-eminences, rights, and privileges by reason of the carriage of goods upon the river in any vessels between the several towns and places aforesaid.

My Lords, the powers and franchises purporting to be granted by this patent, according to the plain meaning of the words, are such as the Crown had no power to grant to a subject. It appears to me that the grant, if valid, would be a gross infringement of both public and private rights. I have anxiously, and with a willing mind, tried to find some construction of the language of the instrument which would make it a valid patent. Like my noble and learned friend (Lord Macnaghten), I cannot adopt Vaughan Williams L.J.'s suggestion of an underlying assumption which is not expressed, and, indeed, is at variance with the words used. Nor, with unfeigned respect for Stirling L.J.'s opinion, can I adopt the view taken by him, for he seems to construe the patent as conferring a franchise for which there is no precedent. He thought that there was some analogy to be found in the well-known franchise of a right of ferry; but I agree with my noble

and learned friend that there is no real analogy between the two cases. The only suggestion I can make to your Lordships is that by the words quantum in nobis est the grant is so qualified and limited as to be subject to whatever rights the public had acquired or private owners possessed. These words, however, are common form words in a Crown grant, and I am not aware of any case in which such an effect has been given to them as would reduce the grant to nothing. Such a construction would, in fact, be repugnant to the grant itself. The part of the patent which I have called the fourth grant contains words similar to those used in Spencer's first patent, which by the context conferred a right to a toll limited to 3*d.* per ton at the passage through each lock. I think that the profits must mean the profits to which Spencer had a legal right under his first patent, and the effect, in my opinion, was to give him (if the second patent was valid) a perpetual enjoyment of the 3*d.* toll in consideration of an increased rent to the Crown. Unless the patent can be construed in some such way as I have suggested, by limiting the three first subjects of grant by the clause quantum in nobis est, or the patent can be upheld as a several grant of the subjects fourthly granted (which is inadmissible on principle), I think that Spencer's second patent must be treated as void; and the consequence would be that the right to take any tolls expired on the termination of the eighty years' reversionary term granted by Spencer's first patent, as was in fact held by Farwell J.

On the other hand, it appears that in both suits of *Jemmatt* v. *Ashley* and *Jemmatt* v. *Ashley, junr.*, the plaintiffs by their bills based their title to the tolls taken on the navigation from St. Ives as far as the town of Bedford on Spencer's second patent. The defendants by their answers in each suit contended that the patent was void and had never been put in force. The particular question in litigation in the first suit related to a portion of the river above St. Neots and between that town and Barford Bridge, the place within four miles of Bedford, to which Spencer was stated to have made the river navigable. The defendant Ashley was lessee of the whole navigation and owner of one moiety of the reversion, the

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plaintiffs being owners of the other moiety. Ashley's contention appears to have been that he had constructed the navigation above St. Neots under the powers of a certain Act of Parliament of 16 Car. 2, and therefore the plaintiffs had no interest in that part of the navigation. The decree dated July 2, 1690, contained a declaration that the river being made navigable up to Barford Bridge by Spencer, and the defendant having taken a lease of the said navigation (from Spencer's successors) and having enjoyed the same under the title of the said lease and the right of the said letters patent (Spencer's second patent), he ought not to be accounted the undertaker under the said Act of Parliament, save only as to the navigation between Barford Bridge and Bedford, and the decision was in favour of the plaintiffs. There was an appeal to this House, and the decree of the Court of Chancery was affirmed. The cases lodged by the parties are before your Lordships, and contain the whole story.

There is no doubt that the validity of Spencer's second patent was put in issue in both suits, and the plaintiffs apparently succeeded on the strength of their title under the patent. But I doubt whether the validity of the patent was really material in either suit, and I do not think that the decree in either suit can be regarded as a judicial decision on the point. At any rate, it is not res judicata as between the parties to the present litigation.

There is, however, one matter which clearly appears from the proceedings in these suits. Both parties acknowledged, and the old witnesses who were examined concurred in saying, that there was a public right of passage for boats through the locks from St. Ives to St. Neots, subject only to the payment of a toll of 3*d.* per ton for all goods passing through each lock. For instance, Thomas Woodstock, in his deposition in the first suit taken in September, 1689, said that he had known the river Ouse from St. Ives to St. Neots for above sixty years, and that there was a free passage up the river for boats during the deponent's remembrance without any leave or licence of the proprietors of the sluice, paying the toll at the several sluices the said boats came through, which was 3*d.* a ton for each

sluice they passed through; and other old witnesses spoke to the same effect. This evidence was read and commented on without objection by both sides.

I ought to mention two arguments addressed by the appellant's counsel to your Lordships. One was that the passage through the locks could not have been dedicated to the public use by Spencer, because he and his successors were lessees only of the land on which the Godmanchester Lock was constructed until the year 1689, when a conveyance of it was made to Ashley by the corporation. I think the correct answer to this argument was given by the respondents, namely, that a lessee can make a valid dedication with the acquiescence of his lessor, for which they cited *Rex* v. *Barr* (1), and that in the circumstances of this case such acquiescence should be presumed. Another argument was that goods continued to be brought by boat to the mill-dam and then "backed over" instead of passing through the locks, and no toll was demanded for such goods. Assuming that the owner of the locks would otherwise be entitled to demand the toll on such goods, or to prevent the evasion of the payment of his tolls in such manner, I think the answer to the argument is that the establishment of the new passage through the locks would not prevent the public from using the older and accustomed way of carrying their goods up and down the river.

With regard to the stanch below St. Ives, I am quite sensible of the difficulty of the question, and express my opinion with some hesitation. On the whole I think there is not enough in the Act of 6 Geo. 1 to impose upon the appellant the duty of maintaining the stanch, and that Farwell J.'s decision was right.

I am, therefore, of opinion that Farwell J.'s decision was correct and should be restored. The point on which I differ from my noble and learned friend Lord Macnaghten is in thinking that by Spencer's acceptance of a grant of the 3*d.* toll the cuts and passage through the locks became a public waterway, and that we are not at liberty to disregard the views to that effect held and expressed by the owners of the navigation

(1) (1814) 4 Camp. 16: 15 R. R. 721.

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in the seventeenth century though they differed as to the origin of it or the strong evidence of the common reputation at that time.

As I understand the majority of your Lordships agree with my noble and learned friend, the order will, of course, be in accordance with his motion.

LORD JAMES. My Lords, for myself I would only say that having had a full opportunity of reading and considering the judgment of my noble and learned friend Lord Macnaghten after it was printed, I concur in the judgment which he has given.

LORD LINDLEY. My Lords, I will not trouble your Lordships with a narrative of the many facts which have to be studied in order to master this extremely difficult case. I will confine myself to the inferences at which after a careful study of all the evidence I have myself arrived.

Both Farwell J. and the Court of Appeal agreed in holding that the cuts in which the six locks are situate were part of the public navigable river. I am convinced that upon this point, at all events, their decision is right. I cannot accept the view that all that has been done in the past by Simpson and his predecessors in title is simply attributable to their ownership of the cuts and locks.

I have very carefully studied the documentary and other evidence in the case, and I think it proved with reasonable certainty that in early times the Ouse was a public river navigable from the sea up as far, or nearly as far, as Bedford. But its navigation was interrupted above St. Ives by weirs, probably unlawfully constructed, but which were legalised by statute 25 Edw. 3, as explained in *Williams* v. *Wilcox*. (1)

For the purposes of this appeal it is immaterial to consider whether the Ouse between St. Ives and Bedford ought to be treated as one public navigable river interrupted by legally existing mill-dams, or as a series of public navigable rivers between mill-dam and mill-dam. The important point is that

(1) 8 A. & E. 314; 47 R. R. 595.

the public navigation brought the waterway of the Ouse within the jurisdiction of the Crown.

I have examined all the authorities I can find on navigable rivers and nuisances in them, but none of them bear very closely on the right of private owners to make cuts and locks so as to divert the water from its ancient course. It is laid down in books of great authority that a river common to all men is called a highway, or is in the nature of a highway; but there are many important differences between water highways and land highways.

There is a passage in Hale's Treatise, De Jure Maris, chap. 3, to the effect that the owner of a private stream may make it navigable and keep it private; but I am not aware of any authority which shews that a private individual can divert the water of a public navigable river through his own land into another public river or another part of the same public river and levy a toll on the public passing over his land through the water which he so diverts. Lord Hale's Treatise, De Jure Maris, chap. 3, is adverse to the existence of any such right. There being no authority in favour of such a right, I am not prepared to assume it. It appears to me inconsistent with the general principles applicable to public navigable rivers and to the taking of tolls. As regards tolls for passing over land, the passage cited from 2 Ro. Ab. 171 D., and 16 Vin. Ab. 577 Da., 8vo. edition, is a very strong authority against the right to take them in the absence of a grant from the Crown.

No right so to deal with the waters of the Ouse has ever been claimed by any of the appellant's predecessors in title, and I am convinced that no such right would have been recognised by any Court in England in olden times.

I will not stop to read Gason's patent, which was granted in 1618, nor to enter in detail into the proceedings which followed. That patent and the orders of the Privy Council, which I have carefully studied, appear to me to establish that Jackson was held entitled under the patent to a reasonable rate or toll for goods carried through the locks. So far as he was concerned the Privy Council could fix its amount, for if he did not submit to their orders they could revoke Gason's patent. But the

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public were in a different position; they were not bound to go through the locks, and if they did the orders of the Privy Council were not technically binding on strangers to the proceedings before them.

Gason's patent, as interpreted and acted upon in the Ouse district before subsequent patents were granted, appears to me to shew: 1. That it conferred on the patentee the right to interfere with the navigation of the Ouse by erecting locks and sluices. 2. That he had a right to charge a reasonable sum for the use of such locks by persons carrying goods through them. 3. That this right was not a mere incident of the ownership of the soil on which the locks were erected. 4. That the sums fixed by the Privy Council were regarded as tolls payable under the patent, and that the right to levy them involved a duty to keep the locks in repair. 5. That an action of assumpsit would lie for the sum or toll so fixed if a person used the lock by carrying goods through it and refused to pay the fixed sum. 6. That a promise to pay such sum was not invalid for want of consideration.

The right of the public on the one hand to use the locks for the carriage of goods, and the right of Gason and his assigns on the other hand to a toll in respect of such goods (but subject to keeping the locks in repair), was in my opinion established, so far as the Ouse is concerned, by Gason's patent and the Orders in Council to which I have referred. The inference that the public had a right to go through the locks on paying the tolls seems to me warranted by the facts, and the doctrine once a highway always a highway is, I believe, as applicable to rivers as to roads. But the obligation to maintain the locks and the right to take tolls might have come to an end when Gason's patent terminated. Instead, however, of coming to an end it was continued for over 200 years, in fact, down to the commencement of this litigation, under the circumstances which I will now shortly explain.

On January 3, 1628 (old style, or 1629 new style), Charles I. granted a patent to Spencer. This was Spencer's first patent. Why it was not granted to Jackson is not known. Unlike Gason's patent of 1618, this patent refers in terms to the Ouse.

I will not stay to read it. In my opinion Spencer's first patent recognised the right of the public to pass through the locks, and legalised and in effect although not in express terms continued the tolls which had grown up under Gason's patent, and in effect fixed those tolls at 3*d.* per ton per lock. If this first patent had not been superseded ten years afterwards by another patent, these tolls would have been payable until July, 1720. The consideration for them would be as regards the Crown the annual payment of 5*l.* to the Crown, and as regards the public the improvement of the navigation by means of the cuts and locks. Farwell J. and the Court of Appeal both agree that after Spencer's first patent, if not before, the cuts were parts of the public navigable river; but these eminent persons have taken different views of the duration of this patent. I agree with the Court of Appeal in their conclusion that this patent was superseded, and in point of law was impliedly if not expressly surrendered by another patent granted to Spencer in 1638 (Spencer's second patent). This second patent gives rise to the real difficulty in the case. If taken to grant all the monopolies mentioned in it, it would be hopelessly in excess of the Royal authority. But the grant is qualified by the words "as much as in us lieth," and the user of 250 years enables your Lordships to see how the grant has been understood and acted upon, and how it can be properly interpreted so as to give it some effect. It is well settled that if a Crown grant admits of two interpretations, one of which makes the grant void and the other of which makes it valid, the latter is to be preferred: Com. Dig. Grant, G. 12; *Reg.* v. *Eastern Archipelago Co.* (1), per Coleridge J. This rule may, in my opinion, be properly applied to the present case. The usage shews how much and how little has been treated as lawfully granted by the patent, and the extent to which the general words ought to be restrained.

The interpretation practically put upon the patent for many years cannot be properly disregarded, and, when interpreted by what has been done under it until the defendant departed from the usage which had prevailed up to his own time, I see no

(1) (1853) 1 E. & B. at pp. 337–9.

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reason for holding the patent to be wholly invalid and of no effect. Practically it has received a very limited interpretation. It has never been treated as conferring on the patentee any control over the navigation of the Ouse outside the locks erected under Gason's patent or Spencer's first patent, nor over any boats or barges except such as carried goods through those locks. In effect it continued but did not create the right to tolls which had grown up under Gason's patent, and had been authorized to be taken by Spencer's first patent, and, as already pointed out, the right to those tolls was accompanied by the duty to keep the locks in repair. The tolls which thus grew up and were afterwards sanctioned and continued were in the nature of tolls thorough, conferring on those who paid them the right of passing through the locks from one part of the old navigable river to the other.

My Lords, towards the end of the seventeenth century Spencer's second patent was brought to the attention of the Courts in two suits known as *Jemmatt* v. *Ashley*, and, although they cannot be regarded as conclusive in the present controversy, they go far to shew that this patent was judicially recognised as valid. It was the foundation of the plaintiff's case in both suits. I will not trouble your Lordships with the details of them.

As regards pleasure-boats the charters are silent, and the usage is comparatively modern and by no means uniform. The toll under the charters was confined to boats and barges carrying merchandise, and I agree that none can be claimed for pleasure-boats. But the cuts are part of the highway, and pleasure-boats can be taken through them without payment.

My Lords, if I am right in the view which I take of Spencer's second patent and of the long usage, it becomes quite unnecessary to call in aid any presumption of a lost grant; and I do not propose to trouble your Lordships with any observations on that very debatable topic. Further, it will follow that the obligations imposed by the patent cannot be got rid of by ceasing to levy the tolls payable under it if they can be got. The appellant cannot divest himself of those obligations simply by ceasing to take tolls. If he wishes to surrender his patent

or to procure its cancellation, he must do so in the proper manner; but so long as it remains in force, and he can obtain tolls enough to enable him to repair the locks, or asserts his rights by taking tolls, so long is he legally bound to perform the duties imposed by it. But I cannot find any duty to keep the locks in repair if the tolls do not enable him to do so, and if he takes none; and here I think the Court of Appeal have gone too far, for they have declared his duty to repair to be unconditional.

The Court of Appeal have decided that the sums payable for tolls since Spencer's second patent are not the sums fixed under Gason's patent and authorized by Spencer's first patent, but reasonable tolls. I feel great difficulty in coming to a clear conclusion on this point; but I am not prepared to differ from the Court of Appeal upon it, as the tolls originated with the orders of the Privy Council, and were clearly fixed with a view to what was reasonable, having regard, inter alia, to cost of erection and repair.

I pass now to the stanch below St. Ives. This is governed by statute, not by any charter. The statute 6 Geo. 1 was passed in 1720. Its provisions are materially different from those found in ordinary railway Acts, and the decisions upon them do not appear to me to govern this case. But the tolls actually obtainable are not sufficient to keep the stanch in repair, and I see no duty cast upon Mr. Simpson to keep the stanch in repair out of his own pocket. It follows, in my opinion, that both his right to take tolls for repairs and his duty to repair have ceased. If he could obtain money enough from the tolls to keep the stanch in repair, I think it would be his duty to levy the tolls and keep it in repair, and if he levied any tolls his duty would be the same.

The conclusions at which I have arrived may be summarized thus:—

1. That the cuts in which the locks are situate are part of the public navigable river, and Simpson has no right to exclude the public from them.

2. That his obligation to keep the locks in repair is conditional on his ability to raise the money necessary for the

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purpose by the tolls he is entitled to levy and on his ceasing to avail himself of his right to collect tolls under the patent.

3. That if he is not able to collect enough to keep the locks in repair and he collects no tolls his obligations to keep the locks in repair also cease, although technically his patent might have to be cancelled to make his position legally invulnerable.

4. That the insufficiency of the tolls appears to be established, but if it is doubtful an inquiry should be directed.

5. That similar observations apply to the stanch.

6. That both Farwell J.'s judgment and the order of the Court should be varied in accordance with these views.

7. That as each party has claimed too much, each should bear his own costs here and below.

That is the order I should propose, but the order of the House will of course be that proposed by my noble and learned friend Lord Macnaghten. I will, however, add the remark that it is obvious that in any view of the case if the Ouse is to be maintained as a public navigable river a special Act of Parliament must be obtained.

Judgment of Farwell J. and order of the Court of Appeal reversed; respondents' cross-appeal and action dismissed with costs both here and below: cause remitted to the Chancery Division.

Lords' Journals, August 5, 1904.

Solicitors: *Batten, Proffitt & Scott; Peacock & Goddard, for J. Percy Maule, Huntingdon.*

[HOUSE OF LORDS.]

GENERAL ASSEMBLY OF FREE CHURCH OF SCOTLAND AND OTHERS } APPELLANTS; H. L. (Sc.) 1904 Aug. 1.

AND

LORD OVERTOUN AND OTHERS . . . RESPONDENTS.

MACALISTER AND OTHERS . . . . . APPELLANTS;

AND

YOUNG AND OTHERS . . . . . RESPONDENTS.

Trust—Church—Identity—Fundamental Doctrines—Limits to Power of Union.

The identity of a religious community described as a Church consists in the identity of its doctrines, creeds, confessions, formularies, and tests.

The bond of union of a Christian association may contain a power in some recognised body to control, alter, or modify the tenets or principles at one time professed by the association; but the existence of such a power must be proved.

The denomination of Christians which called itself the Free Church of Scotland was founded in 1843. It consisted of ministers and laity who seceded from the Established Church of Scotland, but who professed to carry with them the doctrine and system of the Established Church, only freeing themselves by secession from what they regarded as interference by the State in matters spiritual. Two main fundamental doctrines which the appellants, the minority of the Free Church, asserted that the seceders in 1843 carried with them and issued in their Claim, Declaration, and Protest to their supporters and benefactors in that year to stand for all time were the Establishment principle, and the unqualified acceptance of the Westminster Confession of Faith, and they further asserted that these doctrines were part of the constitution of the Church and could not be altered. In 1843 and subsequent years the response to the appeal for funds was most bountiful, and the Free Church was endowed by the liberality of its members, the property being secured under what was called a "Model Trust Deed." For many years efforts had been made to bring about a union between the Free Church and the United Presbyterian Church, also seceders from the Established Church, but a Church pledged to disestablishment. In 1900 Acts of Assembly were passed by the majority of the Free Church and unanimously by the United Presbyterian Church for union, under the name of the United Free Church, and the Free Church property was conveyed to new trustees for behoof of the new Church. The United Presbyterian Church was opposed to the Establishment principle, and did not maintain

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the Westminster Confession of Faith in its entirety. The Act of Union left ministers and laymen free to hold opinions as regards the Establishment principle and the predestination doctrine (in the Westminster Confession) as they pleased. The respondents contended that the Free Church had full power to change its doctrines so long as its identity was preserved. The appellants, a very small minority of the Free Church, objected to the union, maintaining that the Free Church had no power to change its original doctrines, or to unite with a body which did not confess those doctrines, and they complained of a breach of trust inasmuch as the property of the Free Church was no longer being used for behoof of that Church. And they brought this action in the name of the General Assembly of the Free Church, asking substantially for a declarator that they, as representing the Free Church, were entitled to the property:—

Held, reversing the decision of the Second Division of the Court of Session (Lords Macnaghten and Lindley dissenting), that the Establishment principle and the Westminster Confession were distinctive tenets of the Free Church; that the Free Church had no power, where property was concerned, to alter or vary the doctrine of the Church; that there was no true union, as the United Free Church had not preserved its identity with the Free Church, not having the same distinctive tenets; and that the appellants were entitled to hold for behoof of the Free Church the property held by the Free Church before the union in 1900.

By Lord Macnaghten: (1.) That the Free Church when it came into existence claimed the power of altering and amending its Confession of Faith, and accordingly could declare the Establishment principle an open question, and could relax the stringency of the formula required from ministers and others; (2.) that provision for expansion and development was part and parcel of the original trust under which the Free Church funds had been collected, and that there had been no breach of trust.

By Lord Lindley: That any interpretation of the Scripture or of the subordinate standards bonâ fide adopted by the General Assembly of the Free Church, and held by them better to express the doctrine intended to be expressed by the language used in the Confession, was not beyond the power of the Free Church, and that there was no breach of trust.

APPEALS against decisions of the Second Division of the Court of Session, Scotland. (1)

The appellants in the first appeal were office-bearers and certain members of the General Assembly of the Free Church who remained in the Free Church at the union (mentioned below) with the United Presbyterian Church in 1900; and, secondly, the members of a committee empowered by the said Assembly to sue on its behalf.

The action was brought against three sets of defendants,

(1) (1902) 4 F. 1083.

who were the respondents: (1.) the old general trustees of the Free Church before the union—that is to say, those who held the General Church property before 1900; (2.) certain persons claiming to be general trustees after the union for the United Free Church, and as such claiming to hold for behoof of the said Church the whole property of the Free Church so far as vested in the general trustees of that Church in October, 1900; (3.) the Moderator, office-bearers, and members of the General Assembly of the United Free Church and its Commissioners.

These appeals arose out of the union between the Free Church of Scotland and the United Presbyterian Church in 1900. These Churches were both Presbyterian Churches, neither of them were connected with the State, and under the union the Churches were united under the name of the United Free Church of Scotland. In the Free Church the union was approved and passed by a majority of 643 against 27 in the Free Church Assembly—the Supreme Court of the Church—on October 30, 1900. In the United Presbyterian Church the union was agreed to unanimously. A small number of ministers (24 out of 1100) and a larger number of laymen—that is, office-bearers and members, most of them resident in the Highlands—disapproved of the union and refused to enter the United Free Church. They were the appellants and pursuers in the first appeal, and they claimed that they and those who adhered to them alone represented the Free Church of Scotland, and were alone entitled to the whole funds and property of the Free Church which were held for behoof of the Church by its general trustees, who were the respondents in the action, namely, Lord Overtoun and others. The first appeal was concerned solely with the property of the Church as a whole.

Upon the formation of the union large majorities of the congregations adhered to the minority in the Assembly and desired to continue the worship in their churches in connection with the Free Church, and they refused to surrender these churches to the United Free Church. Thereupon the General Assembly of the United Free Church and its Moderator

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brought actions against the ministers and others to oust these ministers, &c., and obtain possession of the churches. Of these actions at least five had been raised in the Court of Session, and four were decided on the same date as the first appeal. An appeal to this House was taken in one of these four actions, which was the second appeal (1), the appellants being the Rev. D. M. Macalister and others (defenders), and the respondents (pursuers), R. Young and J. Harvie, acting trustees, in whom the Free Buccleuch and Greyfriars Church, Edinburgh, was vested, and also the Moderator of the General Assembly for the time being. The action related to the Free Buccleuch and Greyfriars Church, which, prior to the alleged union, belonged to the Free Church. The appellants disapproved of the union, and were not members of the United Free Church, but they had continued to retain possession of the Church and refused to recognise the right of the respondents. The respondents alleged that under the Model Trust Deed the property was not held by the congregation as a congregation, but was held by the trustees for it only as a congregation of the Free Church or any united body of Christians; and they contended that if the action of the Free Church in entering into the union was valid it followed that the property in question was held for behoof of the United Free Church and subject to the regulations and directions of its General Assembly. The appellants denied that they became subject to the ecclesiastical jurisdiction of the Edinburgh Presbytery of the United Free Church, and insisted that its jurisdiction was void and ineffectual; and that the only ground put forward to exclude them from possession of the congregational buildings occupied by them was their refusal to depart from the principles and standards hereto consistently professed by them in common with the whole Church, or to enter into a union which they regarded as destructive of the identity of the Church to which they had so long belonged. In the first appeal the property consisted of real estate of considerable value and of personalty amounting to over 1,000,000*l.*, which were the results of gifts or bequests or the product of collections devoted to the promotion in one

(1) See *United Free Church* v. *M'Iver*, (1902) 4 F. 1117.

form or another of the work of the Free Church as associated in 1843. The appellants sought declaratory conclusions:—

(1.) That all property vested as at October 30, 1900, in the general trustees of the Free Church appointed under various Acts of Assembly of that Church were vested in and held by them for behoof of the Free Church, and that no part thereof could be lawfully diverted to the use of any other association of Christians not maintaining the whole fundamental principles embodied in the constitution of the Free Church without the consent of the said Church, or, at least, without the unanimous assent of the members of a lawfully convened General Assembly of the Church.

(2.) That the United Free Church was as an association associated under a constitution which did not embody nor provide for maintaining intact the whole principles which were fundamental in the constitution of the Free Church.

(3.) That the United Free Church had no right, title or interest in any part of the property in question.

(4.) That former members of the Free Church of Scotland who had adhered to the United Free Church had thereby lost all beneficial right to such property saving only indefeasible vested interests.

(5.) That the respondents vested in the said property could not lawfully apply the same for behoof of the United Free Church or its members.

(6.) That the appellants and those adhering to and lawfully associated with them lawfully represented the Free Church of Scotland, and were entitled to have the whole lands, property, and funds applied according to the terms of the trusts upon which they were respectively held for behoof of themselves and those adhering to and associated with them as constituting the true and lawful Free Church of Scotland; and that the respondents under whose control the said lands, &c., might be for the time being were bound to hold and apply the same for behoof of the appellants and their foresaid, and subject to the lawful orders of the General Assembly of the Free Church, and to denude themselves of the whole of the said lands, &c., in favour of the general trustees nominated by said General

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Assembly or its Commission, subject always to the trusts upon which the said lands, &c., were held for behoof of the Free Church of Scotland as at October 30, 1900. Alternatively to these declaratory conclusions, declarator was sought that the appellants and those adhering to them by declining to adhere to the association known as the United Free Church of Scotland, and by electing to maintain themselves in separation therefrom as an association or body of Christians under the name and distinctive principles of the Free Church of Scotland, had not lost or forfeited any rights which they had at or prior to October 30, 1900, in the said lands, property, and funds, but were entitled to the use and enjoyment thereof (subject to the trusts affecting the same) either by themselves or along with such of the respondents as being formerly members of the Free Church had associated themselves as members of the United Free Church, or others having right thereto or therein, and that in such proportion and upon such conditions as might be determined in the course of the process. The appellants also asked for interdict, and if necessary for reduction of the pretended Acts passed by the Free Church and the United Free Church on October 30 and 31, 1900.

It is necessary to give some historical facts. Queen Mary of Scotland succeeded as an infant in 1542, and during her minority the first movement for reformation commenced. This was for some time under the control of the persons called the Lords of Convention. In 1557 the first Convention was signed, and in 1560 Knox's Confession was adopted by the Estates of Parliament. (1) The Confession attributed to John Knox was included in the Act of 1560. In the same year Papal jurisdiction was abolished (2), and all statutes favouring idolatry and superstition rescinded. (3) Then the

(1) See Appx. A, p. 723.

(2) Act, 1560, c. 2 (Thomson ii. 534): "Thairfoir hes statute and ordainit that the bischope of Rome hais na Jurisdictioun nor autoritie within this realme in tymes cuming: and that nane of our saidis soveranis subjectis of this realme sute or desire in ony tyme heireftir title or ryte be the said bischope of Rome or his sait to ony thing within this realme under the panis of barratrye. . . ."

(3) 1560, c. 3 (Thomson ii. 535): "The thre Estaitis of Parliament hes annullit and declarit all sik actis maid in tymes bipast not aggreing with

Mass was prohibited. (1) Knox's Confession was the Confession of the Church down to 1647, when the Westminster Confession was adopted. In 1563 (c. 8), although no Church was yet established, ministers were endowed (2), and so early as 1561 the ministers were put into possession of incomes (Acts 1567, c. 10; 3 Thomson's Acts, 24). In 1567 Queen Mary resigned in favour of her son James, and in that year, owing to doubts as to the validity of the previous Acts (Mary being absent at that date from the kingdom), the Scottish Parliament passed several important Acts, in which James confirmed the Act abolishing Popery (1567, c. 3), and rescinded all Acts favouring idolatry, and repeated the Confession of Faith (1567, c. 4). (3)

Goddis word and now contrair to the confessioun of oure fayth according to the said word publist in this parliament to be of nane avale force nor effect. . . ."

(1) 1560, c. 4 (Thomson ii. 535): "And presentlie notwithstanding the reformatioun already maid according to Goddis word yet not the less thair is sum of the same papis kirk that stubburnlie perseveris in thair wickit Idolatrie Sayand Mess and baptizand conforme to the papis kirk prophanand thair throw the sacramentis foirsaidis in quiet and secreit places Regardand thair throw nather God nor his holie word Thairfoir it is statute and ordanit in this present parliament that na maner of person or personis in any tymes cuming administrat ony of the sacramentis foirsaidis secreitlie or in ony uther maner of way bot thai that are admittit and havand power to that effect and that na maner of person nor personis say mess nor yit heir mess nor be present thairat under the pane of confiscatioun of all thair guids movable and unmovable and puneissing of their bodeis at the discretioun of the magistrat. . . ."

(2) Act 1563, c. 8 (Thomson ii. 539): "That thay that ar appointit or to be appointit to serve and minister at ony kirk within this Realme have the principall mans of the persoun or Vicar or samekill thairof as salbe fundin sufficient for staiking" (namely, accommodating) "of thame to the effect that thay may the better await upon the charge appointit and to be appointit to thame quhidder the saidis gleibis be set in few or tak of befoir or not or that ane ressonabill and sufficient hous be biggit to thame besyde the Kirk be the Persoun or Vicar or uthers havand the saidis mansis in few or langtakkis. . . ."

(3) 1567, c. 4 (Thomson iii. 14):—

"Anent the annulling of the actis of Parliament maid aganis Goddis Word, and mantenance of idolatrie in ony tymes bypast.

"And for eschewing of sic inconvenientis in tyme cuming, the thre Estatis of Parliament hes annullit and declarit all sic actis maid in tymes by past, not aggreing with Godis word and now contrare to the Confessioun of faith according to the said worde publist in this Parliament to be of nane availl, force nor effect. . . . the contravenaris of the samin act in ony time heirafter to be puneist according to the Lawis, Of the quhilk

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Then in 1567 (c. 6) (1) the Church was established; and the next Act (c. 7) (2) defined the jurisdiction of the Church. Then followed the Coronation Oath, 1567 (c. 8.) (3) In the same year was passed an Act bearing on the jurisdiction of the Church. (3) In 1572 (c. 3) an Act was passed which required subscription to the Confession, and gave the Church jurisdiction as a Church Court (3), and another sanctioned Church excommunications—1572 (c. 14) (3)—and afforded a civil sanction to the Church's Censure Acts, 1572, cc. 4 and 14. (3)

Confessioun of the faith the tennour followis.

"The Confessioun of the Faith and doctrine belevit and professit be the Protestantis of the Realme of Scotland, exhibitit to the Estatis of the same in Parliament and by thair public votis authorisit as a doctrine groundit upon the infallibill word of God." (Then follows the Confession of Faith of 1560 in articulate chapters.)

"Thir actis and articklis ar red in the face of Parliament and ratifyit be the thre Estatis at Edinburgh the sevintene day of August the yeir of God 1560 yeiris."

(1) 1567, c. 6 (Thomson, iii. 23):—

"Anent the trew and haly kirk and of thame that ar declarit not to be of the samin.

"Item forsamekle as the ministeris of the blissit Evangell of Jesus Christ quhome God of his mercie hes now rasit up amangis us or heirefter sall rais aggreing with thame that now levis in doctrine and administratioun of the sacramentis and the pepill of this Realme that professis Christ as he now is offerit in his Evangell and do communicat with the haly sacramentis (as in the reformit kirkis of this Realme ar publictlie administrat) according to the confessioun of the faith. Our soverane Lord with avise of my Lord Regent and the thre estatis of this present Parliament hes declarit and declaris the foirsaid Kirk to be the onlie trew and haly Kirk of Jesus Christ within this Realme and decernis and declaris that all and sindrie quha outher gainsayis the word of the Evangell ressavit and apprevit as the heidis of the confessioun of faith professit in Parliament of befoir in the yeir of God 1560 yeiris as alswa specifyit in the Actis of this Parliament mair particularlie dois expres and now ratifyit and apprevit in this present Parliament or that refusis the participatioun of the haly sacramentis as thay ar now ministrat to be na memberis of the said Kirk within this Realme now presently professit, swa lang as they keip thame selfis sa devydit fra the societie of Christis body."

(2) Act 1567, c. 7 (Thomson, iii. 23):—

"Anent the admissioun of thame that salbe presentit to benefices, havand cure of ministrie.

"Item it is statute and ordanit . . . . that the examination and admissioun of Ministeris within this Realme be only in power of the Kirk, now oppinlie and publicklie professit within the samin. The presentatioun of lawit patronageis always reservit to the just and ancient patronis. . . ."

(3) See Appx. C, p. 727.

In 1579, c. 6 re-enacted the Act 1567, c. 6, which established the true and only Kirk; this was merely done because of a printer's error in the earlier Act. During the above-mentioned twenty years there were communications between the Church and the State; and about 1579 the Church prepared what was termed the "Second Book of Discipline" (1), some parts of which entered the Act of 1692. The Black Acts (1584, c. 2, c. 5), followed. The King came of age in 1587; there followed Act 1587, c. 2 (2), which again ratified his previous Acts concerning the liberty of the Kirk. Up to 1592 Presbytery and Episcopacy had been going hand in hand in the Church, but in that year Presbytery was established as the form of religion in Scotland—1592, c. 8. (3) The next Act (1592,

(1) See Appx. D, p. 727.

(2) Act 1587, c. 2 (Thomson, iii. 429):—

"Ratificatioun of the libertie of the Kirk of God."

(3) Act 1592, c. 8 (Thomson, iii. 541):—

"Act for abolisheing of the actis contrair the trew religioun.

"....this present Act ratifies and approvis all liberties privileges immunities and fredomes quhatsumevir gevin and grantit be his hienes his regentis in his name or any of his predecessoris to the trew and hally Kirk presentlie establisht within this realme and declairit in the first act of his hienes Parliament the tuentie day of October the yeir of God 1579 [c. 6, and 1581, c. 1]. . . . . and all uther actis of parliament maid sensyne in favouris of the trew Kirk AND SICLYK Ratifies and approvis the general assemblies appoyntit be the said Kirk And declairis that it salbe lauchfull to the Kirk and ministrie everilk yeir at the leist and ofter *pro re nata* as occasioun and necessitie sall require To hald and keip generall assemblies Providing that the kingis Majestie or his commissioner with thame to be appoyntit be his hienes be present at ilk general assemblies befoir the dissolving thairof nominat and appoint tyme and place quhen and quhair the nixt generall assemblie salbe haldin. . . . . AND ALS ratifies and approvis the sinodall and provinciall assemblies To be haldin be the said kirk and ministrie twyiss ilk yeir as they haif bene and are presentlie in use to do within every province of this realme AND RATIFEIS and approvis the presbiteries and particulare sessionis appointit be the said kirk with the haill jurisdictioun and discipline of the same kirk agreit upoun be his majestie in conference had be his hienes with certane of the ministrie convenit to that effect Off the quhilkis articles the tennour followis *Materis to beIntreatit in Provinciall Assemblies Thir* assemblies are constitute for wechtie materis necessary to be intreatit be mutual consent and assistance of brethrene within the province as neid requyris This assemblie hes power to handle order and redress all thingis omittit or done amiss in the particulare assemblies. *It hes* power to depose the office beraris of that province for gude and just

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c. 9) (1) conferred civil sanction upon sentences of deprivation. James succeeded to the crown of England in 1603, and, there

caussis desserving deprivation And generallie thir Assemblies hes the haill power of the particular elderschippis quhairof thay ar collectit. *Materis to be Intreatit in the Presbiteries* *The Powcr* of the Presbiteries is to give diligent labouris in the boundis committit to their chairge. That the kirkes be kepit in gude ordour To enquyre diligentlie of nauchtie and ungodly personis and to travell to bring thame in the way agane be admonitioun or threatening of Goddis Jugementis or be correctioun. *It Appertenis* to the elderschip to tak heid that the word of God be puirlie preachit within their boundis the sacramentis richtlie ministrat the discipline intertenyit And the ecclesiasticall guidis uncorruptlie distributit *It* belangis to this kynd of assemblies To caus the ordinances maid be the assembleis, provinciallis, nationallis and generallis to be kepit and put in execution *To mak* constitutionis qlkis concernis *To πρεπον* in the kirk for decent ordour . . . . *It hes* power to excommunicat the obstinat, formall proces being led and dew intervall of tymes observit. ANENT PARTICULARE KIRKIS GIF they be lauchfullie rewlit be sufficient ministeris and sessioun thay haif power and jurisdictioun in thair awin congregatioun in matteris eclesiasticall and decernis and declairis the saidis assembleis presbiteries and sessiounes, jurisdictioun and discipline thairof foirsaid to be in all tymes cuming maist just gude and godlie in the selff Notwithstanding of quhatsumever statutes actis cannon civile or municipale lawes maid in the contrair to the qlkis and every ane of thame thir presentis sall mak expres dirogation." Then the Act proceeded to recite certain Acts: "Item the Kingis Majestie and Estaittis foirsaids declaris that the secund act of the parliament haldin at Edinburgh the xvij day of May the yeir of God J^{m}v^{c}lxxxiiij yeirs" (one of the Black Acts) "sall na wayes be prejudiciall nor dirogat any thing to the privilege tha God has gevin to the spirituall office beraris in the kirk concerning headis of religioun materis of heresie excommunitioun, collatioun or deprivatioun of ministeris or ony sic essentiall censoris speciall groundit and havand warrand of the word of God Item oure said Soverane Lord and Estaittis of Parliament forsaidis abrogatis cassis and annullis the xx act of the same parliament haldin at Edinburgh the said yeir J^{m}v^{c}lxxxiiij yeiris granting commissoun to bishoppis and utheris Juges constitute in ecclesiasticall caussis to ressave his hienes presentatioun to benefices To give collatioun thairupon and to put ordour in all caussis ecclesiastical qlk his Majestie and estaittis foirsaidis declairis to be expyrit in the self and to be null in tyme cuming and of nane availl force nor effect And therefoir ordanis all presentatiounis to benefices to be direct to the particular presbiteries in all tyme coming with full power to thame to give collatiounis thairupon and to put ordour to all materis and caussis ecclesiasticall within their boundis according to the discipline of the Kirk PROVIDING the foirsaidis presbiteries be bund and astrictit to ressave and admitt quhatsumever qualifiet minister presentit be his Majestie or uther laic patrounes."

(1) Act 1592, c. 9 (Thomson, iii. 542):—

"Anent depositioun of unqualifiet

being a debate between the two Parliaments as to the union of the Crowns, an Act was passed in 1604 with a special provision. (1) On James's arrival in England he reverted to his Episcopalian leanings, and down to 1638 there was the Episcopalian interlude, during which James and Charles respectively attempted to restore the Episcopacy to Scotland; however, in 1638 the Scottish nation uprose against Episcopacy and Charles's demand for Royal supremacy.

Between 1638 and 1647 important events occurred, which resulted in the appointment of the Westminster Assembly and in the adoption of what was popularly called the Westminster Confession. (2) The Confession had been framed by an Assembly of Divines at Westminster between 1643 and 1647. It was intended to be the Confession of Faith in all Churches; but in 1647 it was abandoned by the King's actions.

On December 8, 1638 (the Act of the Assembly at Glasgow), declared Episcopacy to be abjured; Act, August 27, 1647, approved of the Confession of Faith; Acts of Assembly approved of the larger and shorter catechisms; and Act, October 29, 1690, ordained the subscribing of the Confession of Faith. In 1661 the Restoration took place; and in 1689, c. 28, the Revolution Settlement.

In 1689 (3) a claim of right was presented to King William

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personis frome thair functionis and beneficis."

"And that the said sentence of deprivatioun salbe ane sufficient cause to mak the said benefice to vaik thairby And the said sentence being extractit and presentit to the patroun The said patroun salbe bund to present ane qualifiet persone of new to the kirk within the space of sex monethis thairefter."

(1) Act 1604, c. 2 (Thomson, iv. 264):—

"Act in favouris of the Kirk."

"That the commissionaris votat and electit in this present Parliament for treating upoun the union betuix the Realmes of Scotland and England sall have na power be vertue of thair said Commissioun of the date of thir presentis To treat confer deliberat nor do anything that in ony maner of way may be hurtfull or prejudiciall to the Religioun presentlie professit in Scotland actis of parliament maid in favouris of the samyn religioun and discipline establissed and observit for Intertenement and preservation thairof."

(2) See Appx. E, p. 730.

(3) Act 1689, c. 28 (Thomson, ix. 38):—

"The Declaration of the Estates of the Kingdom of Scotland containing the Claim of Right and the offer of the Croune to the King and Queen of England.

"Whereas King James the seventh

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and Queen Mary. The Act 1689, c. 28, was termed in the Church the Reformation from Episcopacy.

Thomson's Acts, ix. p. 117, shew that on May 23, 1690, it was ordered "That the clerke Register cause transcryve a just double of the Westminster Printed Confession of Faith to be brought in and presented in Parliament the next Dyet." Then on May 26 "The Confession of Faith underwritten was this day produced, read, and considered word by word in presence of their Majesties High Commissioners and the Estates of Parliament, and being voted and approven was ordained to be recorded in the bookes of Parliament, of the which Confession of Faith the tenor follows." Then followed the Westminster Confession of Faith. Then the Act 1690, c. 7 (1), followed, and ratified the Westminster Confession. (2) By the Act 1690, c. 53, patronage was abolished (2); and in 1697 the "Barrier" Act passed. (3)

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being a profest papist did assume the Regall power, and acted as King without ever takeing the oath required by law, whereby the King, at his access to the government is obliged to swear, To maintain the protestant religion and to rule the people according to the laudable lawes: and Did by the advyce of wicked and evill Counsellers, Invade the fundamentall Constitution of this Kingdome And altered it from a legall limited Monarchy, to ane Arbitrary Despotick power and in a publick proclamation, asserted ane absolute power to cass annul and dissable all the lawes, particularly arraigning the lawes Establishing the protestant religion and did Exerce that power to the subversion of the protestant Religion, and to the violation of the lawes and liberties of the Kingdome. . . .

"All which are utterly and directly contrairy to the knowne lawes, statutes and freedomes of this realme."

[It then referred to Prince William of Orange.]

"In order to such an Establishment, as that their religion lawes and liberties might not be again in danger of being subverted, And the saids Estates being now assembled in a full and free representative of this nation, Takeing to their most serious consideratione, the best meanes for attaining the ends aforesaid Do In the first place, as their ancestors in the like cases have usually done for the vindicating and asserting their antient rights and liberties, DECLARE THAT By the law of this Kingdome no papist can" be King or Queen.

"That Prelacy and the superiority of any office in the church, above presbyters is, and hath been a great and insupportable greivance and trouble to this nation, and contrary to the Inclinationes of the generality of the people ever since the reformatione (they haveing reformed from popery by presbyters) and therefor ought to be abolished."

(1) See Appx. F, p. 735.

(2) See Appx. F, p. 736.

(3) See Appx. G, p. 736.

The appellants maintained that the provision in the Act 1693, c. 38 (1), with regard to the subscription to the Confession of Faith was and is incumbent on the Established Church, and continued to be accepted by the Free Church up to the union in question, but after the union there was no longer the obligation on a United Free Church minister to declare the same to be the confession of his faith, or to own the doctrine therein contained to be the true doctrine which he would constantly adhere to.

The Church having been established at the Revolutionary Settlement, then at the union of the Crowns the Act of 1703 was passed ratifying and approving the laws for establishing, maintaining, and preserving the true reformed Protestant religion. (2) Then came the treaty with England, 1705, c. 50 (3), and the Act of 1707, c. 6 (4), for securing the Protestant religion.

(1) See Appx. F, p. 736.

(2) Act 1703, c. 2 (Thomson, xi. 104), "Act for secureing the true Protestant Religion and Presbiterian Government," ratifies and approves the laws for "establishing maintaining and preserveing the true reformed Protestant Religion and the true Church of Christ as at present owned and settled within this Kingdom as likewayes for establishing ratefieing and confirming Presbiterian Church Government and Discipline . . . . Ratifies Approves and Confirms the fifth Act" (1690) "of the Second Session of King William and Queen Mary's Parliament Intituled Act Ratifieing the Confession of Faith and Settleing Presbiterian Church Government in the haill heads clauses and articles thereof. . . . ."

(3) Act 1705, c. 50 (Thomson, xi. 295), provided "that the said Commissioners shall not treat of or concerning any alteration of the Worship Discipline and Government of the Church of this Kingdom as now by law established."

(4) Act 1707, c. 6 (Thomson, xi. 402):—

"Act for Securing the Protestant Religion and Presbyterian Church Government.

"Our Sovereign Lady and the Estates of Parliament considering that by the late Act of Parliament for a treaty with England for an Union of both kingdoms It is provided that the Commissioners for that Treaty should not treat of or concerning any alteration of the Worship Discipline and Government of the Church of this Kingdom as now by Law Established which Treaty being now reported to the Parliament, and it being reasonable and necessary that the true Protestant Religion as presently professed within this kingdom with the Worship Discipline and Government of this Church should be effectually and unalterably secured, Therefore Her Majesty with advice and consent of the said Estates of Parliament Doth hereby Establish and Confirm the said true Protestant Religion and the Worship Discipline

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In the next Act—1707, c. 7 (Thomson, xi. 406)—the Treaty of Union was ratified and approved, and the Treaty of Union re-enacted and embodied in it the provisions with regard to the established religion in Scotland. In the Act of 1711 (c. xxi.) of the British Parliament the right of patronage was restored. Patronage had in 1690 been abolished; but on the narrative that its abolition had not proved satisfactory Parliament in 1711 restored patronage. That was the state under which the question of disruption began in 1833. Patronage existed originally; then in 1690 it was abolished, and a modified form of popular call to the minister given—namely, to the heritors or landed proprietors who paid the tithe with the elders; and then in 1711 patronage was re-established.

In 1833 what may be called the progressive party in the Church passed an Act of Assembly declaring that the ministers of the parliamentary churches—namely, churches which were erected in the Highlands and outlying districts under certain

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and Government of this Church to continue without any alteration to the people of this land in all succeeding generations. . . . ." [It confirms the Act 1690.] "Provides and Declares that the foresaid true Protestant Religion contained in the above mentioned Confession of Faith with the form and purity of worship presently in use within this Church and its Presbyterian Church Government and Discipline, that is to say the Government of the Church by Kirk Sessions Presbyteries Provincial Synods and General Assemblies all established by the foresaid Acts of Parliament pursuant to the Claim of Right shall remain and continue unalterable, And that the said Presbyterian Government shall be the only government of the Church within the Kingdom of Scotland And further for the greater security of the foresaid Protestant Religion and of the Worship Discipline and Government of this Church as above established Her Majesty with advice and consent foresaid Statutes and Ordains . . . ." [It has already been ordained that the subscription to the Confession of Faith shall be made by all ministers, and it was ordained that it shall also be made by all University principals, professors, and masters connected therewith.] "As also that before or at their admissions they . . . . shall subscribe to the foresaid Confession of Faith as the confession of their faith and that they will practise and conform themselves to the worship presently in use in this Church and submit themselves to the Government and Discipline thereof. . . . . As also that this Act of Parliament and settlement therein contained shall be insert and repeated in any Act of Parliament that shall pass for agreeing and concluding the foresaid Treaty or Union betwixt the two Kingdoms . . . ."

public statutes—should have seats in the Church Courts; another Act provided in the same way not merely for the ministers occupying seats in the Assembly, but in the case of chapels of ease, allocated to them parochial bounds. There was a resolution of the Church in 1838 relating to its independent jurisdiction. (1) Then came the material Act which started the litigation which ensued. It was called the Veto Act, 1835. (2)

The constitution of the Free Church commenced with the document headed, Claim, Declaration, and Protest anent encroachments of the Court of Session General Assembly, 1842. (3) It is a document of the majority in the Established Church (about 3 to 2). The majority afterwards became the Free Church. The majority in 1842 in favour of the claim of right was 241 against 111. The pastoral address (referred to below) was signed as Moderator by Dr. Gordon, one of the Free Church leaders; and the claim of right was moved by Dr. Chalmers, seconded by Dr. Gordon, and spoken to by Mr. Murray Dunlop, the three leaders of the Free Church party, who afterwards went out from the Established Church. The

(1) See Lord Macnaghten's opinion, p. 632.

(2) *May* 29, 1835 (*Veto Act*). *Act on the Calling of Ministers*:—"The General Assembly declare, That it is a fundamental law of this Church that no pastor shall be intruded on any congregation contrary to the will of the people; and, in order that this principle may be carried into full effect, the General Assembly, with the consent of a majority of the Presbyteries of this Church, do declare, enact, and ordain, That it shall be an instruction to Presbyteries that if, at the moderating in a call to a vacant pastoral charge, the major part of the male heads of families, members of the vacant congregation, and in full communion with the Church, shall disapprove of the person in whose favour the call is proposed to be moderated in, such disapproval shall be deemed sufficient ground for the Presbytery rejecting such person, and that he shall be rejected accordingly, and due notice thereof forthwith given to all concerned; but that, if the major part of the said heads of families shall not disapprove of such person to be their pastor, the Presbytery shall proceed with the settlement according to the rules of the Church: And farther declare, that no person shall be held to be entitled to disapprove as aforesaid who shall refuse, if required, solemnly to declare, in presence of the Presbytery, that he is actuated by no factious or malicious motive, but solely by a conscientious regard to the spiritual interests of himself or the congregation."

(3) See Appx. G, p. 737.

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"Claim, Declaration, and Protest" was adopted by the seceders, and adopted in the Deed of Demission.

A section of the Established Church held that it was their spiritual function to supervise the relation between the pastor and his people, and they considered this relation could only be properly established, not by imposing ministers from outside upon the congregation (namely, patronage), but by the voluntary call by the congregation to the minister. Accordingly the majority passed the Veto Act, which brought them into sharp contest with the patrons and gave rise to the *Auchterarder Case* (1), which came up to this House, and which determined that by their Veto Act the Established Church had attempted to override the Act of Parliament.

On April 25, 1843, a few days before the disruption, there was a pastoral address by a special committee of the Assembly. It was for the purpose of calling upon ministers and congregations to set apart a day of humiliation and prayer in reference to the approaching crisis. (2) On May 18, 1843, there was

(1) (1838) 16 S. 661; (1839) Macl. & R. 220.

(2) Pastoral Address issued by authority of the Special Commission of the General Assembly of the Church of Scotland in terms of their deliverance of the 21st of March last. [After referring to the ordinary civil administration it proceeds:—]

"But in addition, the Christian magistrate, as one of the kings of the earth of whom Christ is Prince, is to interest himself directly in the affairs of Christ's Kingdom, and to act as the guardian of religion in the land. In that capacity he has many important functions to discharge in reference to the Church; and he has authority, as the minister of God for good, to take measures for preserving peace and order in the Church,—for reforming abuses and remedying grievances,—for guarding purity of doctrine and discipline, and for supplying the means of grace, in efficiency and abundance, through the ministrations of the Church, to the people under his dominion." . . . . "But it now appears that an entirely different construction is put upon the terms of the Church's establishment by the civil authorities of this kingdom, and that she is not only to be prevented from giving effect to her fundamental principle, 'That no pastor be intruded into any parish contrary to the will of the congregation,' but is to be held subject to the interference of the civil courts, in the exercise of her most sacred spiritual functions connected with the preaching of the Word, the administration of sacraments, the correction of manners, and other matters expressly specified in the statutes of the realm as exclusively under her control."

passed the Protestant disruption, the first express document of the Free Church. (1)

On May 20, 1843, there was a minute by which it was agreed by the Assembly "that a communication be addressed in the name of this Assembly to the members and friends of the Church throughout the land giving a brief account of the proceedings of Thursday last (May 18), together with a list of the protesting Commissioners, ministers, and elders." (2)

It was further agreed that the account of these proceedings should contain the address delivered by the Moderator, Dr. Chalmers, at the opening of the Assembly. The appellants maintained that the ministers and elders separating from the Established Church had not yet carried with them the body of the Church, and that the communication was in the nature of the prospectus of the new association. (3)

That was followed by a resolution of the Assembly, May 22. (4)

(1) See Appendix G, p. 741.

(2) "The Assembly again convened in terms of yesterday's adjournment, and being constituted with devotional exercises by the Moderator, the minutes of last diet were read:—

"It was agreed that a 'communication' be addressed in the name of this Assembly to the members and friends of the Church throughout the land giving a brief account of the proceedings of Thursday last together with a list of the Protesting Commissioners, ministers, and elders; and also of the ministers who have concurred in the Protest; and that the clerks, with the assistance of Mr. Jaffray, be instructed to prepare and publish the communication with the least possible delay. It was farther agreed that the accounts of these proceedings should contain the address delivered by the Moderator at the opening of this Assembly."

(3) "Affectionate Representation of the Free Church of Scotland, 1843. Issued by direction of the General Assembly of May 20, 1843.

"Dearly beloved in the Lord." [Then is set forth what has taken place. Then comes the address of the Moderator, Dr. Chalmers—that is the address delivered by the Moderator at the opening of the Assembly:] "Doctor Chalmers addressed the Assembly as follows . . . ."—See the opinion of the Earl of Halsbury L.C., post, at p. 618.

(4) "That this Assembly approve of the report," "and following out the Claim, Declaration, and Protest," "do now, for themselves and all who adhere to them, separate from the Establishment; protesting that, in doctrine, polity, and discipline, they truly represent the Church of their fathers, whose testimony in behalf of the Crown Rights of the Redeemer as King in Zion, and Prince of the Kings of the Earth, they firmly purpose at all hazards, and at whatever sacrifice, still to maintain; and protesting that henceforward they are not, and shall not be, subject in any respect to the ecclesiastical Judicatures presently established by law in Scotland, but

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In terms of that resolution the Separation and Deed of Demission (1) was prepared renouncing the status, rights, and privileges held by virtue of the Establishment.

that they are and shall be free to perform their functions as pastors and elders towards their respective congregations" (and they reappoint a committee) "with instructions to prepare the draft of an Act and Deed to be adopted and subscribed at as early a period as possible during the subsequent sittings of this Assembly renouncing and demitting the status, rights, and privileges held by virtue of the Establishment, the said draft to be reported."

(1) "ACT OF SEPARATION AND DEED OF DEMISSION BY MINISTERS.

"GENERAL ASSEMBLY, 1843–4.

"23*rd May*, 1843.

"The General Assembly having approved of and adopted the draft of an Act and Deed to be subscribed by Ministers adhering to the Protest, renouncing and demitting their status, rights, and privileges, held by virtue of the Establishment, and the said Act and Deed having thereafter been extended in due and proper form, and subscribed by the parties, was ordered to be recorded.

"The Ministers and Elders subscribing the Protest made on Thursday, the 18th of this instant May, at the meeting of the Commissioners chosen to the General Assembly appointed to have been that day holden, against the freedom and lawfulness of any Assembly which might then be constituted, and against the subversion recently effected in the constitution of the Church of Scotland, together with the ministers and elders adhering to the said Protest, in this their General Assembly convened, did, in prosecution of the said Protest, and of the Claim of Right adopted by the General Assembly which met at Edinburgh in May 1842 years, and on the grounds therein set forth, and hereby do, for themselves, and all who adhere to them, separate from, and abandon the present subsisting Ecclesiastical Establishment in Scotland, and did, and hereby do, abdicate and renounce the status and privileges derived to them, or any of them, as parochial minsters or elders, from the said Establishment, through its connection with the State, and all rights and emoluments pertaining to them, or any of them, by virtue thereof: Declaring, that they hereby in no degree abandon or impair the rights belonging to them as ministers of Christ's gospel, and pastors and elders of particular congregations, to perform freely and fully the functions of their offices towards their respective congregations, or such portions thereof as may adhere to them; and that they are and shall be free to exercise government and discipline in their several judicatories, separate from the Establishment, according to God's Word, and the Constitution and Standards of the Church of Scotland, as heretofore understood; and that henceforth they are not, and shall not be, subject in any respect to the ecclesiastical judicatories established in Scotland by law; Reserving always the rights and benefits accruing to them, or any of them, under the provisions of the statutes respecting the Ministers' Widows' Fund: And farther

The Assembly further enjoined the several presbyteries to record the protest and deed of demission at the beginning of their presbytery books as the ground and warrant of their proceedings. On this the appellants relied as founding the Free Church. The Act of the Assembly, May 30, 1843, appointed a day of thanksgiving. (1) There followed addresses of sympathy from other religious voluntary bodies not established, many of them from England, and they all welcomed the action of the Free Church as an assertion of their own voluntary principles; but the Free Church carefully disabused them of this idea.

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declaring, that this present act shall noways be held as a renunciation on the part of such of the ministers foresaid as are ministers of churches built by private contribution, and not provided or endowed by the State, of any rights which may be found to belong to them, or their congregations, in regard to the same, by virtue of the intentions and destination of the contributors to the erection of the said churches, or otherwise according to law; all which are fully reserved to the ministers foresaid and their congregations: And farther, the said ministers and elders, in this, their General Assembly convened, while they refuse to acknowledge the supreme ecclesiastical judicatory established by law in Scotland, and now holding its sittings in Edinburgh, to be a free Assembly of the Church of Scotland, or a lawful Assembly of the said Church, according to the true and original constitution thereof, and disclaim its authority as to matters spiritual, yet in respect of the recognition given to it by the State, and the powers, in consequence of such recognition, belonging to it, with reference to the temporalities of the Establishment, and the rights derived thereto from the State, hereby appoint a duplicate of this Act to be subscribed by their Moderator, and also by the several ministers, members of this Assembly, now present in Edinburgh, for their individual interests, to be transmitted to the clerk of the said ecclesiastical judicatory by law established, for the purpose of certiorating them that the benefices held by such of the said ministers, or others adhering to this Assembly, as were incumbents of benefices, are now vacant; and the said parties consent that the said benefices shall be dealt with as such: And they authorize the Rev. Thomas Pitcairn, and the Rev. Patrick Clason, conjunct clerks to this their General Assembly, to subscribe the joinings of the several sheets hereof: And they consent to the registration hereof in the Books of Council and Session, or others competent, therein to remain for preservation; and for that purpose constitute," &c.

(1) Act of the General Assembly of the Free Church of Scotland, dated May 30, 1843, appointing a day of thanksgiving, and pastoral address therein referred to.

Pastoral address: "Long was it the peculiar distinction and high glory of the Established Church of Scotland to maintain the sole Headship of the Lord Jesus Christ, His exclusive

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On November 27, 1843, a minute was passed by the special Commissioners respecting the vesting of Church property—that is, Church sites. It contained a form of feu charter. That was the first trust, but it was only of a temporary

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sovereignty in the Church, which is His kingdom and house. It was ever held by her, indeed, that the Church and the State, being equally ordinances of God, and having certain common objects, connected with His glory and the social welfare, might and ought to unite in a joint acknowledgment of Christ, and in the employment of the means and resources belonging to them respectively, for the advancement of His cause. But while the Church in this manner might lend her services to the State, and the State give its support to the Church, it was ever held as a fundamental principle that each still remained, and ought under all circumstances to remain, supreme in its own sphere, and independent of the other. On the one hand, the Church having received her powers of internal spiritual government directly from her Divine Head, it was held that she must herself at all times exercise the whole of it, under a sacred and inviolable responsibility to Him alone, so as to have no power to fetter herself, by a connection with the State or otherwise, in the exercise of her spiritual functions. And in like manner in regard to the State, the same was held to be true, on the same grounds, and to the very same extent, in reference to its secular sovereignty. It was maintained that, as the spiritual liberties of the Church, bequeathed to her by her Divine Head, were entirely beyond the control of the State, so, upon the other hand, the State held directly and exclusively from God, and was entitled and bound to exercise, under its responsibility to Him alone, its entire secular sovereignty, including therein whatever it was competent for, or binding upon, the State to do about sacred things, or in relation to the Church, as, for example, endowing and establishing the Church, and fixing the terms and conditions of that establishment.

"But these simple and broad principles, beloved brethren, on the refusal by the Legislature of the Church's 'Claim of Right,' agreed to by the General Assembly of 1842, left us no alternative but either to cast off our duty to our only King and Head, or to resign our position as an establishment. For the decisions of the Supreme Civil Courts had annexed conditions to that position, to which, had they been proposed to the Church at the time of her first entering into it, she could not lawfully have consented—conditions subversive of the distinct spiritual government established by Christ in His Church, subversive of the essential liberties of His redeemed people, subversive of the constitutional rights of the Church of Scotland as fixed by the Revolution Settlement, and solemnly guaranteed by the Act of Security and the Treaty of Union between the kingdoms. Fully acknowledging, however, the competency of the Legislature, under its responsibility to God alone, to fix the conditions of her establishment, the Church presented to the State her 'Claim of Right' to be protected in her sacred liberties, against what she deemed the oppressive and unconstitutional encroachments of the Civil Courts. Her claim was expressly and deliberately refused."

character, and was followed on May 27, 1844 (1), by the proceedings which led up to the more elaborate Model Trust

(1) May 27, 1844. "The General Assembly did again convene, and being constituted with devotional exercises, the minutes of last diet were read and approved of. The Assembly having called for the report of the Committee appointed to consider the whole matter of the trust deed, the same was given in and read by Mr. Begg, the convener. The General Assembly approve of and adopt the report, and remit to the law committee to prepare a deed in conformity with the principles thereof, and to report to the commission either at its stated meeting in August, or at a special meeting to be called for the purpose, with power to issue the deed and to recommend its adoption to the several congregations of the Church." [Act XVIII., 1844, anent the Model Trust Deed.] "The Assembly approve of the same, and enacted, and do hereby enact, in terms of said Report, the tenor whereof follows, viz., Your Committee have had several meetings and deliberated very fully on the whole subject remitted to them, and they unanimously approve of and recommend the Assembly to adopt the third or intermediate plan recommended by the Special Commission of last Assembly. (1.) That the property of each place of worship be vested in trustees chosen by the congregation, to be held for the congregation, in communion with the Free Church, as attested to be so by the Moderator and Clerk of the General Assembly; that Church to be identified as in the Model Trust Deed; the management of the property to be in the Deacons' Court—all, as nearly as possible, as under the first plan. (2.) That in the event of a certain proportion of the Ministers and Elders, members of the Church Courts, separating from the general body, and claiming still to be the true bonâ fide representatives of the original protestors of 1843, and to be carrying out the objects of the Protest more faithfully than the majority, then, whatever the Courts of law may determine as to which of the contending parties is to be held to be the Free Church, it shall be competent for each congregation, by a majority of its members in full communion, to decide that question for itself, so far as the possession and use of their place of worship and other property are concerned, with or without 'compensation to the minority — such compensation to be settled by arbitration.' It being understood that a disruption of the Church in the sense referred to in this extract shall consist only in the simultaneous separation, that is, the separation from the general body at once, or within a period not exceeding three months, of at least one-third of the ordained ministers of the Church, having the charge of congregations in Scotland; and that such separation shall take place only on the professed grounds stated in the said deliverance of the Commission of Assembly, and it being further understood." [A roll of the members in full communion was to be kept, these members only being entitled to vote.] September 11, 1844: "The Commission having called for the report of the Law Committee relative to the Trust Deed, Mr. Dunlop, Convener of the Committee, submitted a draft of the proposed Deed, which, having been considered, was unanimously approved of, and recommended for adoption to the several congregations of the Church. The Commission

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Deed. The minute was that the General Assembly, having called for the report of the committee appointed to consider the whole matter of the trust deed, approved of the report, and remitted it to the Law Committee to prepare a deed in conformity with the principles thereof, with power to issue the deed and recommend it to the several congregations of the Church. Then there was an Act anent the Model Trust in 1844. The Commission having called for the report of the Law Committee relative to the trust deed (1), Mr. Dunlop, convener of the committee, submitted a draft of the proposed deed, which was unanimously approved and recommended for adoption to the several congregations of the Church.

The appellants also contended that the deed was unquestionably a conveyancer's deed, and that its narrative, which was full of historical inaccuracies, could not in any way be held to affect the constitution of the Church. But the property of the churches was conveyed under the deed, although some congregations did not choose to precisely follow the Model Trust Deed but framed deeds of their own; though the majority of the property was held upon titles which imported the terms of the Model Trust Deed.

In 1846 there was an Act anent question and formula. (2)

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returned their cordial thanks to Mr. Dunlop and the Committee for the manner in which they have discharged the duty committed to them, and particularly to John Clerk Brodie, Esq., W.S., by whom principally the Deed was framed. The Commission farther direct the Moderator to communicate their thanks to Andrew Rutherford, Esq., M.P., for the very efficient assistance."

(1) See Appx. H, p. 743.

(2) See post, p. 598, and Act of the Assembly of 1711 of the Established Church of Scotland, enacting the formula to be signed:—

"LICENSING PROBATIONERS.—*Questions put to Probationers before they are licensed to preach the Gospel.*

"1. Do you believe the Scriptures of the Old and New Testaments to be the Word of God, and the only rule of faith and manners?

"2. Do you sincerely own and believe the whole doctrine of the Confession of Faith, approven by the General Assemblies of this National Church, and ratified by law in the year 1690, and frequently confirmed by divers Acts of Parliament since that time, to be the truths of God contained in the Scriptures of the Old and New Testaments; and do you own the whole doctrine therein contained as the confession of your faith?

"3. Do you sincerely own the purity of worship presently authorised and practised in this church, and asserted in the fifteenth Act of the General Assembly, 1707, entitled

In the Act of 1851, xv. (1), the Free Church defined their standards. In 1853 there was a proposal by some members

'Act against Innovations in the Worship of God,' and also own presbyterian government and discipline now so happily established in this church: and are you persuaded that the said doctrine, worship, discipline, and church government, are founded upon the Holy Scriptures and agreeable thereto?

"4. Do you promise that, through the grace of God, you will firmly and constantly adhere to, and in your station to the utmost of your power assert, maintain, and defend the said doctrine, worship, and discipline, and the government of this Church by kirk-sessions, presbyteries, provincial synods, and general assemblies?

"5. Do you promise that in your practice you will conform yourself to the said worship, and submit yourself to the said discipline and government of this Church, and shall never endeavour, directly or indirectly, the prejudice or subversion of the same?

"6. Do you promise that you shall follow no divisive courses from the present establishment in this Church?

"7. Do you renounce all doctrines, tenets, or opinions whatsoever, contrary to or inconsistent with the said doctrine, worship, discipline, and government of this Church?

"8. Do you promise that you shall subject yourself to the several judicatories of this Church? Are you willing to subscribe to those things?

"*Formula to be signed by Probationers.*

"I , do hereby declare, that I do sincerely own and believe the whole doctrine contained in the Confession of Faith approven by the General Assemblies of this National Church, and ratified by law in the year 1690, and frequently confirmed by divers Acts of Parliament since that time, to be the truths of God; and I do own the same as the confession of my faith; as likewise, I do own the purity of worship presently authorized and practised in this Church, and also the presbyterian government and discipline now so happily established therein, which doctrine, worship, and church government, I am persuaded, are founded on the Word of God, and agreeable thereto; and I promise that, through the grace of God, I shall firmly and constantly adhere to the same; and to the utmost of my power shall in my station assert, maintain and defend the said doctrine, worship, discipline and government of this Church, by kirk-sessions, presbyteries, provincial synods, and general assemblies; and that I shall, in my practice, conform myself to the said worship, and submit to the said discipline and government, and never endeavour, directly or indirectly, the prejudice or subversion of the same; and I promise that I shall follow no divisive course from the present establishment of this Church, renouncing all doctrines, tenets, and opinions whatsoever, contrary to, or inconsistent with, the said doctrine, worship, discipline, or government of this Church."

The Free Church formulas were the same, except that they left out the phrases, "Ratified by law in the year 1690," and "Now settled by law," but the same questions are put to proposed ministers [see post, p. 598], and the formula to be signed by the person ordained contained this: "And I promise through the Grace of God I shall firmly and constantly adhere to the same and to the utmost of my power."

(1) See Appx. I, p. 748.

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to the Church recommending the issue of a statement of the principles of the Church (1); and a similar movement in 1857.

In 1847 the United Presbyterian Church was formed, composed of the relief Church which went out in 1761 on the abuse of patronage, and the United Secession, 1733. The basis of the union of these two Churches was adopted in May, 1847 (2); and in 1848 they framed rules and formularies. (3)

There was a movement amongst certain members of the Free Church for union with the United Presbyterian Church, and a joint committee was appointed, who made a report. (4) A second report was made in 1866. In 1867 a further report giving articles of agreement, and restrictive articles under the

(1) "Act VII., 1853, anent the principles of the Church.

"The General Assembly having resumed the consideration of the overtures on the Principles of the Church, did, and hereby do, resolve as follows:—

"1. That this Church maintains, unaltered and uncompromised, the principles set forth in the Claim, Declaration, and Protest of 1842 and the Protest of 1843, relative to the lawfulness and obligation of a Scriptural alliance between the Church of Christ and the State, and the conditions upon which such an alliance ought to be regulated,—as well as also the position which, in the maintenance of these principles, the Church was called upon to take in 1842 and 1843, as a Church protesting against invasions of her just and constitutional rights, and demanding redress of the wrongs thus inflicted.

"2. That while, in pursuance of the righteous protest and demand aforesaid, it is 'free to the members of this Church, or their successors, at any time,' as the Claim of Right asserts, 'when there shall be a prospect of obtaining justice, to claim restitution of all such civil rights and privileges, and temporal benefits and endowments as' they 'were then compelled to yield up,'—there is not any present call to take any such step in that direction, as would imply renewed negotiations with statesmen or renewed application to the legislature.

"3. That is the duty of the Church, all the more on this account, to adopt measures for keeping before the minds of the people, and especially of the rising generation, the principles which this Church holds, and the position which she occupies as the Free Protesting Church of Scotland.

"4. That the Committee be appointed to draw up a popular summary, in the narrative form, of the principles and contendings of the Church of Scotland from the earliest times to the present, adapted to the purpose indicated in the previous resolution, and to report progress to the next General Assembly."

(2) See Appx. J, p. 752.

(3) See Appx. K, p. 753.

(4) See Appx. L, p. 754.

heading the "Civil Magistrate" was made (1); but the committee failed to agree. In 1870 the Synod of the United Presbyterian Church considered an overture proposing a revisal of the Church's Confession and Catechisms, with a view to remove the statements not approved in the basis of union. The Synod rejected the overture. (2) As part of the consecutive circumstances, in 1879 the Synod of the United Presbyterian Church passed a Declaratory Act (3) shewing the position then taken as

(1) "2. STATEMENTS—DISTINCTIVE ARTICLES.

"*By the Free Church and English Presbyterian Church Committees.*

"As an act of national homage to Christ, the civil magistrate ought, when necessary and expedient, to afford aid from the national resources to the cause of Christ, provided always that in doing so, while reserving full control over his own gift, he abstain from all authoritative interference in the internal government of the Church. . . ."

"*By the United Presbyterian Church Committee.*

"That it is not competent to the civil magistrate to give legislative sanction to any creed in the way of setting up a civil establishment of religion, nor is it within his province to provide for the expense of the ministrations of religion out of the national resources. . . ." [For the remainder, see Lord Alverstone's opinion, post, p. 715.]

(2) The overture was read. The Synod then proceeded to give judgment on the subject of the overture, and, after reasoning, it was moved and seconded—"That, forasmuch as the interpretation of the terms of the Basis is regulated by the terms of the formula of October, 1847, declaring that office-bearers of the Church are not required to approve of anything in the subordinate standards that teaches or is supposed to teach compulsory or persecuting and intolerant principles in religion, thereby securing full liberty of opinion with reference to civil establishments of religion, the Synod dismiss the overture as uncalled for and inexpedient."

(3) "DECLARATORY ACT, adopted by Synod, May, 1879.

"1. That in regard to the doctrine of redemption as taught in the Standards, and in consistency therewith, the love of God to all mankind, His gift of His Son to be the propitiation for the sins of the whole world, and the free offer of salvation to men without distinction on the ground of Christ's perfect sacrifice, are matters which have been and continue to be regarded by this Church as vital in the system of Gospel truth, and to which due prominence ought ever to be given.

"2. That the doctrine of the divine decrees, including the doctrine of election to eternal life, is held in connection and harmony with the truth that God is not willing that any should perish but that all should come to repentance, and that He has provided a salvation sufficient for all, adapted to all, and offered to all in the Gospel; and also with the responsibility of every man for his dealing with the

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to the Westminster Confession. On the eve of the union in 1897 they made a report on disestablishment and disendowment. (1) In the meantime the Free Church had made

free and unrestricted offer of eternal life. . . .

"4. That while none are saved except through the mediation of Christ, and by the grace of His Holy Spirit, who worketh when, and where, and how it pleaseth Him; while the duty of sending the Gospel to the heathen, who are sunk in ignorance, sin, and misery, is clear and imperative; and while the outward and ordinary means of salvation for those capable of being called by the Word are the ordinances of the Gospel: in accepting the Standards, it is not required to be held that any who die in infancy are lost, or that God may not extend His grace to any who are without the pale of ordinary means, as it may seem good in His sight.

"5. That in regard to the doctrine of the Civil Magistrate, and his authority and duty in the sphere of religion, as taught in the Standards, this Church holds that the Lord Jesus Christ is the only King and Head of the Church, and 'Head over all things to the Church, which is His body'; disapproves of all compulsory or persecuting and intolerant principles in religion; and declares, as hitherto, that she does not require approval of anything in her Standards that teaches, or may be supposed to teach, such principles.

"6. That Christ has laid it as a permanent and universal obligation upon His Church, at once to maintain her own ordinances, and to 'preach the Gospel to every creature'; and has ordained that His people provide by their freewill offerings for the fulfilment of this obligation.

"7. That, in accordance with the practice hitherto observed in this Church, liberty of opinion is allowed on such points in the Standards, not entering into the substance of the faith, as the interpretation of the 'six days' in the Mosaic account of the creation: the Church guarding against the abuse of this liberty to the injury of its unity and peace.

"The following question of the Formula contains the terms in which the Subordinate Standards are accepted by the office-bearers of the Church:—'Do you acknowledge the Westminster Confession of Faith and the Larger and Shorter Catechisms as an exhibition of the sense in which you understand the Holy Scriptures, this acknowledgment being made in view of the explanations contained in the Declaratory Act of Synod thereanent?'"

(1) "EXCERPTS from SYNOD PAPERS, May, 1897.

"REPORT OF COMMITTEE ON DISESTABLISHMENT AND DISENDOWMENT.

"The question of Disestablishment during 1896 and 1897, although in present political circumstances not capable of being successfully dealt with in Parliament, has yet been kept before the minds of the public by the action of its opponents no less than by that of its supporters.

"Advantage has been taken of the present political situation by State Church supporters to endeavour to push through Parliament" (certain measures).

"It has been the aim of the Synod's Committee to bring the Voluntary Principles of the Church to bear on

certain advances to bring them into line with the United Presbyterian Church. Ministers of one Church could become

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the various public questions that have emerged since last meeting of Synod. . . .

"XVI. JUBILEE OF UNITED PRESBYTERIAN CHURCH.

"The Synod's Committee issued in March to ministers and Synod elders *Tract XXV.*, prepared by the Convener, viewing the Jubilee of the United Presbyterian Church in the light of its Historical Testimony as to the Proper Relations between the Church and the State. It was also sent to Free and Established Church ministers. . . .

"XIX. PROPOSED MOTION OF COMMITTEE.

"In conclusion the Committee recommends that the Synod resolve in the following or like terms:—

[The following words are repeated in the Synod's own language in adopting the report.]

"7th May, 1897.

"The Synod called for the Report of the Committee on Disestablishment and Disendowment, which was presented by Mr. Benjamin Martin, Convener. Mr. Martin was heard, and concluded with the following motion, namely:—

"That the Synod, having heard the Report, approves generally of the action of the Committee in upholding the Church's testimony on the proper relations between the Church and the State, and in favour of religious equality by Disestablishment and Disendowment; instructs the Committee to embrace all fit opportunities of making its Voluntary principles known throughout the Church and the community; and authorizes it to support such Disestablishment Bill or Resolution in Parliament as shall give effect to these principles, and to oppose, in accordance with former Synodical decisions, new legislation to strengthen the Established Church.

"The Synod further recommends ministers, elders, and members to assist in their several localities in diffusing a knowledge of the voluntary principles of the Church, and in promoting legislation for the Disestablishment and Disendowment of the Established Church of Scotland.

"The motion was seconded, and unanimously adopted."

Tract XXV. was called "The Jubilee of the United Presbyterian Church in the light of its Historical Testimony as to the Proper Relationship between the Church and the State," and said: "The United Presbyterian Church maintains as one of its most distinctive principles that it is not the province of the State to establish and endow the Christian Church."

"This principle as now defined in Voluntaryism was not professed by the founders of the secession and relief churches. But the Ecclesiastical position they assumed, and their principle of spiritual independence which led them to take up that position, contained the germ of Voluntaryism, and ultimately made it easy and inevitable for their successors to develop the clearer and fuller theory now held as to the unscripturalness and injustice of the civil establishment of religion."

"The United Presbyterian Church, thus looking back to the testimony of its various branches on the relations of Church and State during

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ministers of the other; but the Free Church so worded their Mutual Eligibility Act, 1874 (1), that it compelled any minister of the United Presbyterian Church joining the Free Church to adopt the position of the Free Church. In 1875 also over-

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the last 164 years, consistently lifts up on this its Jubilee its distinctive witness against civil establishments of religion, and demands in the name of every justice that the Established Churches in England and Scotland should be disestablished and disendowed."

"The Synod, having heard the Report" (that is, on this disestablishment and disendowment), "approves the action of the Committee in upholding the Church's testimony on the proper relations of Church and State, and in support of religious Equality by Disestablishment and Disendowment."

(1) "XXV.—ACT anent signing of the FORMULA.

"1st June, 1874.

"The General Assembly, with consent of Presbyteries, enact and ordain: [*Note.*—This Act had been passed as an interim Act by the General Assembly of the preceding year on 29th May, 1873.] That in every case of induction into any spiritual office or function in this Church, the person to be inducted shall sign the Formula prescribed in Act XII., 1846, intituled, 'Act anent Questions and Formula,' during public worship on the day of induction, immediately after giving satisfactory answers to the questions appointed in said Act to be put to him; and that in every case of a minister being proposed to be called who belongs to another branch of the Church of Christ, if the Presbytery find the call regular and sufficient so far as the congregation is concerned, they shall adjourn to meet on a subsequent day, not sooner than a fortnight nor later than four weeks thereafter, except when the call is to a minister in the Colonies, in which case the adjournment may be prolonged; and shall transmit to the minister proposed to be called an extract of that finding, together with a copy of the said Act XII., 1846, as hereinafter amended, including the preamble as well as the enacting part, as also a copy of the present finding of the Assembly in full, embracing the Act of Assembly, Class I. 4, of date Thursday, 29th May, 1873, passing the Mutual Eligibility Overture into a law, with relative declaration in full, and also a copy of this Act, informing him that if no communication is sent beyond a simple acknowledgment of their receipt, the Presbytery will then, upon the assumption that no difficulty exists on his part as regards the said documents, proceed in the case according to the laws of the Church. And at the diet for the induction of any minister thus called, the Presbytery shall, before the induction service, record the fact that the provisions of this Act have been duly complied with.

"The Assembly also, with consent aforesaid, rescind the last clause of s. 9 in the second head of the said Act XII., 1846, as being superseded by the provisions now enacted, anent the time and manner of signing the Formula."

tures were made. (1) Then, thirteen years after the Declaratory Act of the United Presbyterian Church, the Free Church in 1892 (2) passed a Declaratory Act, which the appellants con-

(1) "XXVI.—ACT anent UNION with REFORMED PRESBYTERIAN CHURCH.

"27th May, 1875.

"The General Assembly having considered the Report of the Committee on Union with the Reformed Presbyterian Church, and the Extract Minute of the Synod of that Church on the subject, approve generally of the Report, and record their thanks to the Committee and the interim Convener.

"The General Assembly declare their great gratification and thorough satisfaction with the result of the conferences and with the course now taken by the Synod. They welcome with cordiality the prospect of the proposed Union on the terms suggested. They declare their high esteem for the ministers and elders and members of a Church which has for so long a period testified for Scriptural truth, and they appoint a Committee, to be afterwards named, to prepare an Overture with a view to the contemplated Union which may be submitted to a future diet of this Assembly, and, if approved of, transmitted to Presbyteries for their consideration in terms of the Barrier Act."

"XXVII.—OVERTURE transmitted to PRESBYTERIES for their Opinion anent UNION with REFORMED PRESBYTERIAN CHURCH.

"The Assembly agree to transmit to Presbyteries in terms of the Barrier Act the following Overture, viz.:—

"Whereas further, it appears that the Synod are willing to accept without reserve the existing Formula of the Free Church of Scotland, on the understanding that the Act of Assembly, 27th August, 1647 [the Act by which the General Assembly accepted the Westminster Confession], and the Preamble to the Act XII. of Assembly 1846 are held to be in force as interpreting the said Formula, and also to allow the name of the United Church to be the Free Church of Scotland, so as to involve no change by this Church in that respect."

(2) "ACT (DECLARATORY ACT) anent CONFESSION OF FAITH.

"(No. 8 of Class II.)

"26th May, 1892. Sess. 13.

"Whereas it is expedient to remove difficulties and scruples which have been felt by some in reference to the declaration of belief required from persons who receive licence or are admitted to office in this Church, the General Assembly, with consent of Presbyteries, declare as follows:—

"That, in holding and teaching, according to the Confession, the Divine purpose of grace towards those who are saved, and the execution of that purpose in time, this Church most earnestly proclaims, as standing in the forefront of the revelation of Grace, the love of God—Father, Son, and Holy Spirit—to sinners of mankind, manifested especially in the Father's gift of the Son to be the Saviour of the world, in the coming of the Son to offer Himself a Propitiation for sin, and in the striving of the Holy Spirit with men to bring them to repentance.

"That this Church also holds that all who hear the Gospel are warranted

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demned as contradictory to Chapters III. and X. of the Confession of Faith, and left it to the Church to decide what parts of the Confession might be written out. There were numerous protests against this Act, and a qualifying Act was passed in 1894. (1) Then, following these Acts out, the Free

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and required to believe to the saving of their souls; and that in the case of such as do not believe, but perish in their sins, the issue is due to their own rejection of the Gospel call. That this Church does not teach, and does not regard the Confession as teaching, the foreordination of men to death irrespective of their own sin.

"That it is the duty of those who believe, and one end of their calling by God, to make known the Gospel to all men everywhere for the obedience of faith. And that while the Gospel is the ordinary means of salvation for those to whom it is made known, yet it does not follow, nor is the Confession to be held as teaching, that any who die in infancy are lost, or that God may not extend His mercy, for Christ's sake, and by His Holy Spirit, to those who are beyond the reach of these means, as it may seem good to Him, according to the riches of His grace.

"That, in holding and teaching, according to the Confession of Faith, the corruption of man's whole nature as fallen, this Church also maintains that there remain tokens of his greatness as created in the image of God; that he possesses a knowledge of God and of duty; that he is responsible for compliance with the moral law and with the Gospel; and that, although unable without the aid of the Holy Spirit to return to God, he is yet capable of affections and actions which in themselves are virtuous and praiseworthy.

"That this Church disclaims intolerant or persecuting principles, and does not consider her office-bearers, in subscribing the Confession, committed to any principles inconsistent with liberty of conscience and the right of private judgment.

"That while diversity of opinion is recognised in this Church on such points in the Confession as do not enter into the substance of the Reformed Faith therein set forth, the Church retains full authority to determine, in any case which may arise, what points fall within this description, and thus to guard against any abuse of this liberty to the detriment of sound doctrine, or to the injury of her unity and peace."

(1) "XXXIII.—ACT anent DECLARATORY ACT 1892 on CONFESSION of FAITH.

"29th May 1894.

"Whereas the Declaratory Act 1892 was passed to remove difficulties and scruples which had been felt by some in reference to the declaration of belief required from persons who receive licence, or are admitted to office in this Church, the Assembly hereby declare that the statements of doctrine contained in the said Act are not thereby imposed upon any of the Church's office-bearers as part of the standards of the Church; but that those who are licensed or ordained to office in this Church, in answering the questions and subscribing the formula, are entitled to do so in view of the said Declaratory Act."

Church commenced their union campaign—every step being resisted by the minority—by issuing an overture (1) for the consideration of the presbyteries. Then there followed on October 31, 1900, the Uniting Act. (2) The previous day an Act had been passed by the General Assembly of the Free Church dealing with property (3), and which the action was raised to set aside. Then followed the Act of the United Free Church appointing the united body of trustees to hold the property. Neither of the formularies of the two uniting Churches was accepted by the other; therefore an Act was passed providing a new formula. (4) On the union being

(1) See Appx. M, p. 756.

(2) The same thing over again as the overture, with the declarations appended to it by both parties.

(3) "ACT of the GENERAL ASSEMBLY of the FREE CHURCH OF SCOTLAND, dated 30th October 1900.

"Whereas a Union of the Free Church of Scotland and of the United Presbyterian Church, under the name of the United Free Church of Scotland, is in contemplation and is about to be consummated:

"And whereas in the event of the proposed union being carried out, it is necessary and expedient in the interest of the said Free Church of Scotland and the said United Free Church of Scotland, and for facilitating the administration and work of the said United Free Church of Scotland, and of the various institutions connected with and forming the same, that it be enacted, ordained, and declared, as the General Assembly, in virtue of the powers belonging to them under the rules and regulations of the said Free Church of Scotland, or otherwise belonging or competent to them, hereby specially Enact, Ordain, and Declare that the United Free Church of Scotland is and shall be the successor in office of the said Free Church of Scotland . . . . and further that the whole property belonging to the Free Church of Scotland, or in which the said Free Church is interested, presently vested in, or in any way held by the said Free Church of Scotland . . . . shall belong to the United Free Church of Scotland, and shall be vested in, and held for behoof of the United Free Church of Scotland" . . . . (and its officials and so forth).

(4) "ACT anent QUESTIONS and FORMULA (No. 2 of Class I.) 31st October 1900. Sess. 1.

"The General Assembly, in accordance with the terms of the Uniting Act, enact and ordain that the following Questions and Formula, considered and agreed upon by the Inferior Courts of the two Churches, shall be the Questions and Formula to be used at the Ordination and Induction of Ministers and Office-Bearers in the United Free Church:—

"PREAMBLE AND QUESTIONS AT THE LICENSING OF PROBATIONERS.

"PREAMBLE.

"(*To be publicly read when the Questions are put.*)

"It is hereby declared, that the following Questions are put in view

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carried, the minority, who had all along protested, brought these actions. In the first appeal the first five articles of the condescendence merely gave the history of the immediate cause of disruption in 1843.

Cond. 6. It set forth (inter alia) that the signatories, for the reasons stated in the Claim of Right, Declaration, and Protest of May 18, 1842, and Protest of May 30, 1843, should "be free to exercise government and discipline in their several judicatories, separate from the Establishment, according to God's Word, and the Constitution and Standards of the Church of Scotland, as heretofore understood."

Cond. 7. "By the 19th Act of the said Assembly of 1843 . . . . the several Presbyteries of the Free Church were enjoined to record the Protest taken on May 18 of that year, together with

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of Act 1647 (1), approving of the Confession of Faith; Act XII. 1846 (2), of the Free Church of Scotland; Declaratory Act, 1879 (3), of the United Presbyterian Church; and Act XII. 1892 (4), with relative Act of 1894, of the Free Church; and that probationers are entitled to take advantage of any of these Acts.

"It is hereby also declared, that the documents referred to in Question No. 4, and there named for brevity the Claim of Right of 1842, the Protest of 1843, and the Basis of Union of 1847, are respectively the 'Claim, Declaration, and Protest adopted by the General Assembly of the Church of Scotland in 1842,' and the Protest of Ministers and Elders, Commissioners from Presbyteries to the General Assembly, read in presence of the Royal Commissioner, on 18th May 1843, and the 'Basis of Union adopted by the Synod of the United Presbyterian Church on 13th May 1847.'

"QUESTIONS.

"1. Do you believe the Scriptures of the old and New Testaments to be the Word of God, and the only rule of faith and life?

"2. Do you sincerely own and believe the Doctrine of this Church, set forth in the Confession of Faith approven by Acts of General Synods and Assemblies; do you acknowledge the said doctrine as expressing the sense in which you understand the Holy Scriptures; and will you constantly maintain and defend the same, and the purity of worship in accordance therewith?

"3. Do you disown all Popish, Arian, Socinian, Arminian, Erastian, and other doctrines, tenets, and opinions whatsoever, contrary to and inconsistent with the said doctrine of this Church?" [It contained six more clauses, which it is not necessary to give.]

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(1) See Appx. E, p. 730.
(2) Post, p. 598.
(3) Ante, p. 539.
(4) Ante, pp. 543–4.

the Act of Separation and Deed of Demission "as the ground and warrant of their proceedings.'"

Cond. 8. "In consequence of the Disruption from the Establishment of the ministers and members who constituted themselves the Free Church of Scotland, and in accordance with the grounds and reasons of such Disruption, as set forth in the foresaid constituting documents of said Free Church, it was found necessary to amend the Questions and Formula formerly in use by the Established Church of Scotland at the licensing of probationers, and the ordination of deacons, elders, and ministers respectively, and accordingly, on July 1, 1846, the General Assembly of the Free Church, by Act 1846, cap. 12, readjusted the Questions and Formula of the Established Church so as to adapt them to the position which the Free Church had taken up, and to embody the profession of her ministers and office-bearers . . . ."

Cond. 9. "Further, on 31st May, 1851, the General Assembly of the Free Church, by Act of Assembly 1851, cap. 9, sanctioned the publication of a volume containing the subordinate standards and other authoritative documents of the said Church, and adopted an Act and Declaration relative thereto. . . . . The said subordinate standards were those of the Church of Scotland, viz., the Confession of Faith, the Larger and Shorter Catechisms, and the Directory for Public Worship and form of Church Government agreed upon by the Assembly of Divines at Westminster in 1643. The said Act of Assembly and Act and Declaration incorporated therein were merely declaratory and not enacting, and the provisions of the Barrier Act, referred to in answer, were not applicable thereto. They were in entire accordance with the origin and construction of the Free Church, and accordingly recognised the said Confession of Faith as the test of their profession to be imposed by subscription upon her ministers and elders."

Cond. 10. "The said Free Church of Scotland is a voluntary association or body of Christians associated together under a definite contract involving the maintenance of definite principles. That contract is constituted by the foresaid Claim of Right, Declaration, and Protest of 1842, Protest of 1843, and

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Act of Separation and Deed of Demission of 1843, and the Acts of Assembly of the Church of Scotland, in so far as not modified thereby. The foresaid contemporaneous documents, viz., the Act of Assembly of 1846, cap. 12, and the Questions and Formula thereby sanctioned, and the Act of Assembly of 1851, cap. 9, are in accord therewith and expository thereof. Said constituting documents recognise as an essential principle of the Free Church the assertion of the duty of the State 'to maintain and support an establishment of religion in accordance with God's Word,' and as an essential standard of her belief, the Westminster Confession."

Cond. 11. "The contract of association or constitution of the said Free Church of Scotland under which it was first associated contains no provision for any alteration" by a majority.

Cond. 12 set forth that the Church had from time to time acquired property: "Said contract of association or contract or constitution does not provide for or admit of any majority of the members of the Free Church of Scotland thereby constituted diverting the said property from the uses of said Church to the uses of any other Christian association of Christians, and particularly to the uses of any such church or association holding principles and standards of belief differing from those of the said Free Church of Scotland as originally constituted. The individual pursuers became members, ministers, or office-bearers of the said Free Church of Scotland under and in reliance upon its constitution as hereinbefore defined."

Cond. 13. The Establishment principle was defined: "The said principle formed an essential principle of the Free Church of Scotland, and its maintenance was one of the main reasons for the formation of that Church as a separate association or body of Christians, distinct and apart from those who professed themselves to be 'voluntaries.' There were several such associations of seceders from the Established Church of Scotland in existence at the time of the Disruption of 1843, holding views practically identical with those of the founders of the Free Church in matters of doctrine and as to the encroachments of the civil courts, but differing from them as regarded

the duty above referred to. In regard to this, these bodies were 'voluntaries' in the sense of holding such action of the State to be unlawful. The foundation of the Free Church was a protest against the position of such churches on the one hand, just as it was against the encroachments of the civil power on the other."

Cond. 14 set out that from about 1864 a party favouring union with the United Presbyterian Church arose.

Cond. 15. "In 1897 the United Presbyterian Synod's Committee upon Disestablishment and Disendowment issued, as an official statement of the position of that Church, a tract (No. 25), entitled 'The Jubilee of the United Presbyterian Church in the light of its historical testimony as to the proper relations between the Church and State, 1897,' which commences with the affirmation that 'The United Presbyterian Church maintains as one of its most distinctive principles that it is not the province of the State to establish and endow the Christian Church.' After a narrative expounding the history of the testimony of the constituent elements of the United Presbyterian Church and of that Church itself on the question, the tract enunciates as the conclusion arrived at that, 'To minimise the value of the voluntary principles of the United Presbyterian Church as of late adoption and not essential to its testimony, is to deny the facts of history, and to refuse to see in them the natural and necessary growth of the earlier contendings of the Fathers.' In reporting to the Synod of 1897 the said committee stated (inter alia) that 'It has been the aim of the Synod's Committee to bring the voluntary principles of the Church to bear on the various public questions that have emerged since the last meeting of Synod.' And the Synod, at its meeting of 7th May, 1897, approved of the committee's action in upholding the Church's testimony on the proper relations between Church and State, and instructed it to take all fit opportunities of making its voluntary principles throughout the Church and the community, and authorized it to support such parliamentary action as should give effect to these principles. At the same time the Synod renewed 'the testimony of 1847 of the United Presbyterian

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Church, constantly maintained,' 'that it is not within the province of civil government to provide for the religious instruction of the subject, and that this department of the education of the young belongs exclusively to the parents and the churches.' The said tract (No. 25), Report of Committee and Resolutions of Synod . . . . correctly express the conception of the United Presbyterian Synod itself of the position of that Church towards the Establishment. Similar resolutions had been previously passed by the Synods of (inter alia) 1848, 1850, 1851, 1854, 1865, and 1866; and resolutions to the like effect were adopted at the Synods of 1898, 1899, and May, 1900 . . . ."

Cond. 16. "The principles of the United Presbyterian Church are also in other important respects at variance with those of the Free Church of Scotland, and in particular as after mentioned in the qualified acceptance as its standard of the Westminster Confession of Faith."

Cond. 17. "For a considerable time all efforts in the direction of Union failed, by reason of the objections of those who adhered with loyalty to the distinctive principles of the two Churches respectively. In the Free Church these efforts were met with determined opposition by a large body of ministers and elders who had been leaders in the Disruption movement of 1843, and who maintained that such Union would involve defection from the distinctive testimony and principles of the Free Church, and who were prepared, and known to be prepared, to carry their resistance to the utmost length. Consequently the negotiations for Union were in 1871 for the time being abandoned. It was only after these leaders had passed away that the party adhering to the Church's principles of 1843 was overborne by a younger generation of clergy and elders, who had revived and carried on the negotiations for an incorporating Union of the Free Church with the United Presbyterian Church, which ultimately resulted in the pretended Acts after mentioned."

Conds. 18 and 19 contain statements practically to this effect. There was also set forth that in 1873 and 1874 there were passed by the Free Church of Scotland Acts for the purpose of

making mutually eligible ministers of the United Presbyterian Church and ministers of the Free Church, that is, to make eligible for a charge a minister then holding a position in the United Presbyterian Church.

Cond. 20: "It was not till 1891 that any farther step towards the proposed Union with the United Presbyterian Church was made. This took the form of a measure which was introduced into the General Assembly of the Free Church in that year, and was in 1892, though only under protest, passed into the Act of Assembly, 1892, No. 8 of Class II., in which the Assembly, claiming for the first time the authority to determine what points in the Confession of Faith entered and what points did not enter into the substance of the Reformed Faith, proceeded to qualify the Confession of Faith as therein set forth, and reserved to itself authority to make such further qualifications as should be deemed proper. The said Act was termed the Declaratory Act, 1892; there was also passed under protest the Act 1894, c. 9, an Act anent the Declaratory Act, 1892, on the Confession of Faith. By said last-mentioned Act it was, with a view to minimise the apparent effect of the Declaratory Act, provided that the statements of doctrine contained in said Declaratory Act, 1892, were not imposed on the Church's office-bearers as part of the standards of the Church, but that those who were licensed or ordained to office in the Church should thereby be entitled to accept the Questions and Formula of the Free Church in view of the said Declaratory Act, that is, to accept and subscribe the same under reservation. The Act of 1894 had not been transmitted under the Barrier Act, presumably because of its declaratory character. These Acts were necessary to bring the Free Church into line with the United Presbyterian Church, with a view to the proposed Union, and constituted a grave defection from the principles of the Free Church as originally constituted."

Cond. 21: "By the Basis of Union of the United Presbyterian Church, adopted at its constitution in 1847, it was declared Head 2: 'That the Westminster Confession of Faith and the Larger and Shorter Catechisms are the Confession and Catechisms of this Church, and contain the Authorized Exhibition

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of the sense in which we understand the Holy Scriptures, it being always understood that we do not approve of anything in these documents which teaches, or may be supposed to teach, compulsory or persecuting and intolerant principles in religion. But in May, 1879, the Synod of the United Presbyterian Church had adopted a Declaratory Act whereby they modified these standards as therein set forth, and further modified the formula to be accepted by the office-bearers of the Church, to the effect of making the modifications of the Declaratory Act not merely permissive but compulsory, in that the subscriber was called on to acknowledge the Westminster Confession of Faith and the Larger and Shorter Catechisms, not as an exhibition of the sense in which he understood the Holy Scriptures, but as such exhibition only when qualified by the explanations contained in said Declaratory Act."

Cond. 22 referred to the Declaratory Act of 1892, when negotiations for union were reopened, and averred: "The General Assembly of the Free Church had no power in itself to pass an Act of Union with any other Church, and particularly an Act of Union which involved a departure from the essential and distinctive principles of the Free Church as originally constituted and from its standards of faith, and which created and constituted a new and independent Church or association of Christians distinct from the Free Church of Scotland."

Conds. 23 to 28 narrated the proceedings of 1900.

Cond. 29 shewed that a new formula for ministers was necessary, and that was passed.

Cond. 29: "The said pretended Act of Union had been preceded by communications between committees pretending to represent both Churches. These committees, after communicating to one another the existing doctrinal standards, rules, and methods of their respective Churches, had reported that 'it appeared that in regard to doctrine, government, discipline, and worship therein set forth, a remarkable and happy agreement obtained between them,' and this statement was accepted by the majority of the General Assembly of the Free Church. This alleged agreement was only rendered possible by the foresaid qualifications in 1892 of the Questions and Formula of the

Free Church, and by the still farther qualification to be after mentioned. As precedent to said pretended Act of Union, such farther qualification had been agreed upon as stated in said pretended Act of Union by the committees representing the Free Church and the United Presbyterian Church of Scotland respectively, and had been approved by a majority of the General Assembly and by the General Synod of these Churches respectively as embodied in the 'Questions and Formula to be used at ordination and induction in said United Church.' Accordingly said pretended Act of Union was, on the alleged consummation of said Union, followed by an Act anent Questions and Formula of the General Assembly of the United Free Church of Scotland, passed on 31st October, 1900, being Act of Assembly, 1900, cap. 2. Said Act enacted and ordained that the Questions and Formula therein embodied should be 'the Questions and Formula to be used at the ordination and induction of ministers and office-bearers in the United Free Church.' Each set of questions was prefaced by a preamble, which it was made obligatory should be read before the questions are put, and which declared that the questions are put in particular in view of the Declaratory Act, 1879, of the United Presbyterian Church, and Act XII. 1892, with relative Act of 1894, of the Free Church, and that probationers, ministers, and elders, as the case may be, are entitled to avail themselves of any of these Acts. But the questions themselves imported a wider deviation from the standards of the Free Church of Scotland than did either the Declaratory Act, 1879, of the United Presbyterian Church or the Declaratory Acts, 1892 and 1894, of the Free Church of Scotland. In place of the question in the Formula of 1846: Question 2. 'Do you sincerely own and believe the whole doctrine contained in the Confession of Faith, approved by former General Assemblies of this Church to be founded upon the Word of God; and do you acknowledge the same as the confession of your faith; and will you firmly and constantly adhere thereto, and to the utmost of your power assert, maintain, and defend the same, and the purity of worship as presently practised in the Church?' there was substituted the following: 'Do you sincerely own and believe the doctrine of

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this Church set forth in the Confession of Faith approven by Acts of General Synods and Assemblies; do you acknowledge the said doctrine as expressing the sense in which you understand the Holy Scriptures; and will you constantly maintain and defend the same, and the purity of worship in accordance therewith?' The said Act anent Questions and Formula was thus a farther and essential departure from the fundamental standards of doctrine of the Free Church of Scotland as constituted in 1843, and imported an abandonment of the Westminster Confession of Faith and a substitution therefor of the doctrine of the United Church, whatever for the time that doctrine might be held to be, set forth in the Confession of Faith. Said doctrine, which had already been rendered indefinite by the said Declaratory Acts of 1892 and 1894, was thus rendered still more indefinite by the adoption of said Act anent Questions and Formula, and is subject to be again qualified by farther Declaratory Acts of the United Church. The absence of finality in such a standard is accentuated by the terms of the first of the declarations adopted as relative to the Act of Union of 31st October, 1900. The said qualification of the Questions and Formula in the above vital manner was an abandonment by the Unionist members of the Free Church of Scotland of the Westminster Confession as the fundamental standard in doctrine of their Church, and such abandonment was essential to any Union with the United Presbyterian Church"

Cond. 30 narrated the appointment of new trustees.

Conds. 31 and 32 stated that the proceedings for the union were null and void.

Conds. 33 to 41 gave the actings of the minority, claiming that they had continued the Free Church, and that they had a good title to sue.

Conds. 42 to 45 gave reasons for the action, and a statement in regard to the property of the Free Church.

Then in 1900, the day before the union, the Assembly of the Free Church passed an Act transferring the moneys and property to new trusts, which was the Act complained of.

Then in the statement of facts for the respondents (defenders)

statement 1 alleged that "for some years prior to 1843 differences of opinion existed within the Church of Scotland as to the nature and extent of the separate jurisdiction of the Church in matters spiritual," and it narrated the separation.

Statement 2 (see above, condescendence 13) alleged: "The said alleged principle referred to by the pursuers in condescendence 13 was not a fundamental or integral principle in the constitution of the Free Church, and it has not at any time formed part of the doctrines, articles of faith, tenets, creed, or contract binding upon ministers or other office-bearers or members of the Free Church of Scotland. The said Free Church as soon as possible after 1843 modified its constitution as a Church separate from the State, and settled the conditions which should be binding on its ministers and other office-bearers. This was done by an Act of the General Assembly in 1846, viz. Act XII., 1846. The Church therein adopted certain questions to be put to, and a certain formula to be subscribed by, office-bearers on their admission to office. The said questions and formula were adopted ad interim in 1844 and 1845, and in 1846 said Act was passed by the General Assembly, entitled 'Act anent Questions and Formula,' which having received the consent of the majority of Presbyteries in terms of the Barrier Act hereinafter referred to, became a law of the Church. The said Act and the questions and formula are founded on. The only new question added to those in use in the Church of Scotland previous to 1843 was the 5th question. The declaration in the preamble of said Act as to the Church disclaiming intolerant principles, &c., was not part of the Act as it received the approval of Presbyteries under the Barrier Act. It was added by the General Assembly in passing the Act, and was not therefore at that time made (as it subsequently was) binding as a law of the Church. The only documents incorporated into the said Act of 1846 and made binding on ministers and office-bearers of the Church are the Scriptures, the Confession of Faith, the Claim of Right, and the Protest, but the two latter only in so far as concerns their general principles with respect to one point, namely, the spirituality and freedom of the Church. No other articles or conditions

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or agreements were required to be accepted or assented to, and on subscribing the above formula ministers of the Church became entitled to the status and emoluments of office and to share in and beneficially enjoy the property of the Church. In particular, ministers were not required as a condition of office and of receiving the emoluments of office in the Church or of beneficial enjoyment of the property of the Church to declare their acceptance of a doctrine or principle that it is the right and duty of the civil magistrate to maintain and support an Establishment of Religion. Office-bearers other than ministers were likewise not required to accept the said alleged principle. Private members of the Church were not required to subscribe the above formula or any formula, or to make any profession on the subject. The Confession of Faith does not contain or set forth the said alleged principle in respect to the right and duty of the civil magistrate in regard to Establishments of Religion as an article of faith or doctrine or belief. It teaches that nations and their rulers are bound to own the authority of Christian truth, but the Free Church has always held that the teaching of the Confession in this matter is to be read and understood in harmony with the principle (which the Confession also teaches) that the Christian Church has an independent government and jurisdiction in matters spiritual, distinct from the civil magistrate, and also in harmony with the view that the Confession is not to be accepted as favouring intolerance or persecution or interfering with liberty of conscience. The alleged principle as to the right and duty of the civil magistrate to maintain and support an Establishment of Religion has always been in the Free Church an open question in regard to which liberty of opinion has been permitted and exercised, and as to which wide differences of opinion have all along prevailed. The most widely accepted opinion in the Free Church has been that the duty of the civil magistrate to own the authority of Christian truth is generally most properly discharged in the modern state in other ways than by setting up a Civil Establishment of Religion, and that the supporting and maintaining of such an Establisment is merely a particular application of the general principle as to the civil magis-

trate's duty in regard to religion—an application which may be expedient or inexpedient according to circumstances."

Statement 3: "The Free Church as a voluntary association of persons united together for religious purposes possessed from the beginning the right at common law to control and regulate its own affairs, and, if it saw fit, to change its own doctrines or tenets by virtue of its legislative power inherent in the General Assembly—its Supreme Court—acting by a majority of its members. Further, the Church of Scotland had claimed such right even when in statutory connection with the State, and the Free Church, inasmuch as it claimed to be the historic Church of Scotland, continued after 1843 to exercise said right as a Church separate from the State in terms of the Barrier Act (Act 1697, c. 9). Said Act provides: [It gave part of the Act.] According to the view which the Free Church has always taken of this Act, it contemplated that the Church might competently make 'alterations or innovations' in doctrine, worship, discipline, or government, and provided means whereby such changes should be carried out only after deliberate procedure, and after full opportunity had been given to the whole Church to express its opinion. When the procedure set forth in the Act had been adopted, an Act of Assembly passed with the approval of a majority of the Presbyteries of the Church became a 'binding Rule and Constitution of the Church.' On the other hand, no Act of Assembly which had not so obtained the approval of a majority of Presbyteries was 'a binding Rule and Constitution' of the Church. Prior to the passing of the Barrier Act, the supreme legislative power to innovate upon doctrine, worship, &c., resided in the General Assembly acting by a majority of the members of any single General Assembly. Previous General Assemblies had made fundamental changes in doctrine, &c., by votes of a single Assembly. An illustration of this is the adoption by the Assembly of 1647 of the Westminster Confession of Faith, subject to the declarations in the Act of 1647 (which were never acknowledged by Parliament) as the binding creed of the Church in place of its former Confession. The Barrier Act was a limitation and regulation of the hitherto unlimited powers

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of any single Assembly to make changes in doctrine, worship, discipline, or government of the Church. The Established Church repeatedly exercised its legislative powers under the Barrier Act. Instances of this are the Declaratory Act as to Parliamentary Churches, 25th May, 1833; Declaratory Act as to Chapels of Ease, 31st May, 1834, admitting into its own body the pastors of 200 non-parochial congregations; Act, 1st June, 1835, putting an end to the appointment of ministers against the veto of a majority of the people, although such appointments had been submitted to for 120 years or thereby under the Statute of Queen Anne, 1711; Act, 25th May, 1839, anent reunion with Seceders, including in its own body the ministers and members of the Original Secession Church. By this and other Acts the Church had changed and modified its own 'doctrine or worship or discipline or government.' It claimed to exercise the right to do so in virtue of its own independent spiritual jurisdiction and without restraint from the State, even when the Church was in statutory connection with the State. The Civil Courts refused to acknowledge such rights in the Church, as being inconsistent with the conditions of Establishment, and the Free Church was constituted in order that as a Church apart from and not in alliance with the State it might freely enjoy such rights. Accordingly, at various times since 1843, it has modified its doctrine, worship, discipline, and government as it saw fit, by proceedings taken in conformity with the Barrier Act, and the Acts so passed became laws binding on the whole Church, affecting and controlling both the members of the Church and the property vested in or belonging to it. The Act XII., 1846, above referred to, is one of these."

On August 9, 1901, the Lord Ordinary (Lord Low) dismissed the actions. (1) And on July 4, 1902, the Second Division of the Court of Session recalled the Lord Ordinary's interlocutor in so far as it dismissed the actions, and in lieu thereof assoilzied the respondents from the conclusions thereof. In the view taken by the Lord Ordinary, the Lord Justice-Clerk, and Lord Trayner, the only doctrines which would appear to be funda-

(1) 4 F. 1083, 1117.

mental were not those which gave the Church its individuality, but those that were common to it and other Presbyterian or like Christian Churches. Lord Young regarded nothing as unalterable.

The appeal was heard first on November 24, 26, 27, 30; December 1, 3, 4, 7, 1903, before the Earl of Halsbury L.C., and Lords Macnaghten, Shand, Davey, Robertson, and Lindley.

The House took time for consideration.

On March 8, 1904, Lord Shand died, and the appeal was ordered to be reheard; and was reheard on June 9, 10, 13, 14, 16, 17, 20, 21, 23, 1904, before the Earl of Halsbury L.C., and Lords Macnaghten, Davey, James of Hereford, Robertson, Lindley, and Alverstone C.J.

First Hearing.

Henry Johnston, K.C., and *Roberton Christie* (both of the Scottish Bar), were heard for the appellants.

Asher, D.F., and *Haldane, K.C.* (with them *Guthrie, K.C.*, and *Orr*) (all of the Scottish Bar except the second), were heard for the respondents.

[It is not necessary to give their first arguments, as their second arguments on the rehearing covered and amplified their first.]

Second Hearing.

Henry Johnston, K.C., and *Salvesen, K.C.* (with them *Roberton Christie*), for the appellants. The two appeals fall to be argued together. The major appeal dealt entirely with the property which belonged to the Free Church as a whole. The minor appeal dealt with congregational property, i.e., with property which belonged to particular congregations of the Free Church. This second appeal was a test case, being one of five different cases brought in the Courts below to try the question of right to congregational property.

The practical question to be solved on the appeals is whether it is the right of the majority of the Free Church to unite with another body, namely, the United Presbyterian

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Church, against the will of the minority of the Free Church, and to carry with them into the new body formed by their union both the Church and the congregational property. It may be well to explain at the outset that the term "voluntary," as used in the documents to be referred to, does not bear the meaning which it would in the same relation in England. The word "voluntary" in the ordinary sense means a Church maintained by voluntary contributions; but in this controversy it had always meant "independent of State aid" and not merely refusing State aid, but resenting State aid, and holding it to be illegal.

The first ground on which the appellants maintain that the majority of the Free Church has departed from the original Free Church constitution is, that whereas the Free Church according to its original constitution maintained the duty of the State to establish and endow the Church, or the Establishment principle, that majority has abandoned this principle by amalgamating with a Church, the United Presbyterian Church, which was founded in support of Voluntaryism in the technical sense above explained. The second ground on which the appellants maintain that the majority has departed from the original Free Church constitution is, that whereas the Free Church had adopted without qualification as its creed the Westminster Confession of Faith, the majority of the Free Church, with a view to their union with the United Presbyterian Church, and in their Act of Union with that Church, have qualified and in fact discarded as their creed the Westminster Confession. The respondents, on the other hand, maintain that the Establishment principle was not a fundamental or essential principle of the Free Church constitution—that though non-essential they have not abandoned it in their union with the United Presbyterians, and that they have not discarded but merely interpreted the Westminster Confession. But, further, they maintain that the Free Church as it existed from 1843 to 1900 had, as a Church independent of State aid and State control, absolute legislative power to alter anything in its doctrine, discipline, and government. Therefore, for the appellants to succeed, they must shew, first, that the above two

principles were essential elements in the constitution of the Free Church in 1843; secondly, that in the union they have been departed from; and, thirdly, that the Free Church of Scotland had not either inherently as a Church, or in consequence of any terms of its constitution, any power to alter that which was an essential of its constitution as an independent body. There is no question that the appellants, though members of the Free Church as it existed in 1900, have maintained with unbroken continuity the original principles and organization of that Church, and, though a much-diminished body, are still the Free Church of Scotland as founded in 1843. Put in another form, the question is whether the majority have power to compel the minority to follow them into the union under pain of loss of all interest in the Church's general and congregational property, and under pain of being treated as seceders.

The constitution of an independent Church based on distinctive principles once fixed cannot be altered unless there is a provision for alteration contained and machinery for altering provided in its original constitution. No such provision in machinery was contained in the constitution of the Free Church. The respondents contend that an absolute power resided in the Free Church to alter at common law its doctrines in virtue of the legislative power inherent in their General Assembly. There is no such right at common law. It may be conceded that the church has power to make by-laws to regulate its own internal affairs, but it has no power to change doctrine or essential principle. The Free Church claims to be the true Church of Scotland as it stood by law established in 1843, but rejecting the State interference in spiritualibus and all its consequences, which had been upheld by the Civil Courts in the ten years' conflict of 1833 to 1843, and therefore "Free"—Free in rejecting the vitiated Establishment supported by the Civil Courts and the Legislature of that date, but equally free to return to a purified Establishment.

The law of the case is to be found authoritatively laid down by the House of Lords in *Craigdallie* v. *Aikman* (1), relating

(1) (1820) 1 Dow, 1, 15, 16; 2 Bli. 529, 535; 21 R. R. 107.

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to the affairs of a congregation of the "Secession" Church of 1733, the earliest organized Church which had seceded from the Established Church of Scotland. Craigdallie, the appellant, represented the senior minister, adhered to by a majority of money contributors to the church edifice and property, but who were a minority of the congregation. They maintained adherence to original principles, and in doing so revolted from the General Assemby of the Church. The respondents represented the minority of the money contributors but the majority of the congregation, and they adhered to the General Synod or governing body of their Church. The question was which was entitled to the church property. The Court of Session, November 16, 1803, held in favour of Craigdallie, the appellant, and the majority in point of pecuniary interest; but on a rehearing, February 1, 1804, they changed their view and gave the judgment for the respondents as adhering to the General Synod. This House held on appeal that the principle on which the case had to be decided was neither on a comparison of money contributions, nor on adherence to the General Synod, but on adherence to original principles. Lord Eldon said: "Independent of any other consideration then, the extreme difficulty, if not impossibility, of applying these interlocutors as they stood, rendered it highly desirable that the matter should be reviewed. But if the judges below still adhered to the principle, it was this principle, that because in 1737 a society then agreeing in their religious opinions adhered to a presbytery or Synod then holding the same opinions with themselves, the property belonging to that society should be held on trust, not for those who adhered to their original principles, but in trust for those who adhered indeed to the Synod but who did not adhere to their original principles; that was a proposition very difficult to be maintained in law. But if the Court below should still adhere to that principle, then the objection arose, How could the principle be applied in practice? It was true the Court could not take notice of religious opinions, with a view to decide whether they were right or wrong, but it might notice them as facts pointing out the ownership of property. With respect to the doctrine of

English law on this subject, if property was given in trust for A., B., C., &c., forming a congregation for religious worship, if the instrument provided for the case of a schism then the Court would act upon it; but if there was no such provision in the instrument and the congregation happened to divide, he did not find that the law of England would execute the trust for a religious society at the expense of a forfeiture of their property by the cestuis que trust for adhering to the opinions and principles in which the congregation had originally united. He found no case which authorized him to say that the Court would enforce such a trust, not for those who adhered to the original principles of the society, but merely with a reference to the majority, and much less if those who changed their opinions instead of being a majority did not form one in ten of those who had originally contributed, which was the principle here. He had met with no case that would enable him to say that the adherents to the original opinions should under such circumstances for that adherence forfeit their right. If it was distinctly intended that the Synod should direct the use of the property that ought to have been matter of contract, and then the Court might act upon it; but there must be evidence of such a contract, and here he could find none."

The case went back to the Court of Session; but the ultimate decision did not alter the law which has been consistently followed since, that adherence to original principles must be the test whenever you come to a question raised as to property held in trust for a body such as the congregation in that case, and the law cannot be different when dealing, not with congregational property, but with general Church property. In *Attorney-General* v. *Pearson* (1) the decision in Craigdallie was followed: see also *Attorney-General* v. *Shore*. (2)

To understand how the disruption in 1843 took place, the statutory history of the Established Church must first be considered, and then what was the real question which caused

(1) (1817) 3 Mer. 353, 417, 419; 17 R. R. 100.
(2) (1833–6) 7 Sim. 309, 311.

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the disruption, namely, the matter in litigation during the ten years which preceded the disruption. [The learned counsel then gave the statutory history given above.]

The consideration of the historical position of the Established Church in 1843 as deduced from the Acts of Parliament themselves is essential in order to determine what were the rights which the Free Church carried with them from the Established Church into their position of freedom. The Statutes of Queen Mary, 1560, 1567 (1), shew how the original Confession of Faith was adopted. A creed is drawn at the request of the Estates of Parliament in 1560 which is credited to Knox, and popularly known as "Knox's Confession" or the "Scots Confession," and the whole articles are printed in the Act. The creed precedes the Church. Popery in all its forms is abolished in 1560. Ministers in 1563 (2) have manses or parsonages; and as early as 1561 they had incomes assigned to them (Act of 1567, c. 10, proceeding on a minute by the Privy Council, namely, the Second Council, No. 2, November 22, 1561, 2 Thomson's Acts, 606). In consequence of doubt as to the validity of Acts passed when Queen Mary was not within the kingdom, on her abdication and the succession of her infant son James the Marian Acts are re-enacted in 1567 (3), accepting the Confession as fixed. The Act of 1567 (c. 6) (4) for the first time established the Church. Then by the coronation oath the true religion is to be maintained, "religion" meaning "creed" or "confession." In 1567 the jurisdiction of the Church is defined, but confined to preaching correction of manners, namely, discipline, and administration of the sacraments. Then a religious test by subscription to the Confession is required, and a power of deprivation is included which first recognised the Church as a judicatory or court (though not a legislature), with power to deprive of office those who did not adopt, maintain, and subscribe to the Confession. Then in 1572 an Act (c. 14) gives power to the Civil Courts to enforce deprivation by the Church by depriving

(1) See Appx. A, p. 723.
(2) Ante, p. 521.
(3) Ante, p. 522.
(4) Ante, p. 522.

the delinquent of any civil rights in the benefice. About 1579 the Church did prepare and present to the Crown for approval what was called the "Second Book of Discipline." Certain parts of it only were adopted and embodied in the Act of 1592 (1), which Act had always been considered as the charter of Presbyterianism, it being the first legislative recognition of the Presbyterian system. If the Free Church had inherent legislative power, they had it from the Established Church. But so far the Established Church had none, and only a limited judicial power. King James, shortly after his arrival in England in 1603, reverted to Episcopacy. From 1633 to Charles I.'s death there was the struggle of the Revolution. The Westminster Confession of Faith had been framed by the Assembly of Divines at Westminster, and adopted, not by the General Assembly merely, but on its solicitation by Parliament in 1647. Thomson's Acts, May 23, 1690, again shewed that in the Revolution Settlement it was ordered that a double copy of the Westminster Confession be presented to Parliament, that on May 26 the Confession was read word for word, and that the Act of 1690 (c. 7) (2) ratified the Confession and settled in Scotland the Presbyterian Church government. The Act of 1693 (c. 8) ratified the Act of 1690, and ordained that no person shall be admitted a minister unless he subscribe the Confession of Faith ratified in the 5th Act of the second session of that Parliament, declaring the same to be the confession of his faith, and that he owns the doctrine therein contained to be the true doctrine. That provision respecting subscription to the Confession was incumbent upon the Established Church, and was incumbent on it in 1843, and continued to be accepted by the Free Church up to the date of the union in 1900; but, as the appellants will shew, it is not so now. [The learned counsel then referred to the Acts of Queen Anne, 1703, ratifying the true form of religion, Act 1707 (Treaty of Union), and Act 1711, 1 Anne, c. 12, restoring right of patronage.] That was the statutory history of the Established Church down to 1833, when various Acts of its Assembly, then dominated by the majority for the time, who afterwards formed

(1) Ante, p. 523. (2) See Appx. F, p. 735.

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the Free Church, were passed, which caused the ten years' litigation which preceded the disruption of 1843 and formation of the Free Church. Thus in 1833 the Assembly of the Established Church passed an Act declaring that ministers of parliamentary churches—that is, churches non-parochial erected in the Highlands—should have seats in the Church Courts. The next Act the respondents rely on as an Act of legislation is the Act of Assembly of 1834, which provided in the same way, not merely for ministers of chapels of ease occupying seats in the Assembly, but in the case of those chapels of ease for allocating to them parochial bounds carved out of the parishes in which they were situated and those adjacent.

Then came the "Veto Act of 1835," which really started the litigation (1), embodying the principle which has been termed "non-intrusion," and aiming to confer a veto on the congregation in the appointment of ministers to parochial charges.

The *Auchterarder Case* (2) arose in consequence of this Veto Act. That case arose in these circumstances. A majority of the Established Church held that it was the spiritual function of the congregation to form for themselves the pastoral relation between their minister and his flock, and they considered that that relation could only be properly formed, not by imposing ministers from outside upon the congregation, but by the voluntary "call" of the congregation to the ministers. Accordingly this majority passed the Veto Act, which at once brought the patrons up in arms. The Earl of Kinnoull and his presentee opposed the presbytery's attempt to override the patron's presentation. The Court of Session by a majority and this House unanimously determined that by the Veto Act the Established Church had attempted to override the Act of Parliament as to patronage, and that the patron's presentee must be accepted unless there were from members of the congregation reasoned objections, and not merely an unreasoned veto. That was one of the many cases which during these ten years agitated the Church.

(1) Ante, p. 529. (2) 16 S. 661; Macl. & Rob. 220.

The proceedings of 1842 and 1843, which formed the written constitution of the Free Church, founded in their preamble not only on the statutory history of the Established Church, but also of the Church's attempts during the previous ten years to establish the principle of non-intrusion. The spiritual independence of which so much was heard was in 1843 no more than the independence of the Church of State or judicial interference in the formation of the pastoral tie and suchlike. It was no assertion of general independent legislative power to alter the essentials of its constitution and its creed or to change its form of Church government, which was what the claim of the United Free Church truly amounted to. Without knowing the history of the Established Church and the cause of the disruption, the true meaning of the constitution of the Free Church cannot be arrived at. The respondents try to stretch the terms of these constitutional documents by divorcing them from the circumstances under which they were used. The "Claim, Declaration, and Protest" anent the encroachments of the Court of Session adopted by the General Assembly in 1842 (1) was a document of the Established Church, because the Established Church was then one and undivided, and was not disrupted until 1843; and, that being so, it could not be expected that a document by the Established Church would put forward as essential and fundamental the Establishment principle. The document necessarily assumes the principle that is sharply contrasted: there is the power of the "Keys" (that is, the right of internal government and discipline, including the right to determine the relation between the pastor and his congregation and everything connected with selection, admission, and induction of the minister) and the power of the "Sword," or the civil power as wielded by the Civil Courts. There is nothing in that whole document bearing on legislative power. In the Claim, Declaration, and Protest the Established Church said: "The above-mentioned essential doctrine and fundamental principle in the constitution of the Church." One has to ask what is the above-mentioned essential doctrine. Apparently it is that there resides in the Church a spiritual jurisdiction independent of

(1) See Appx. G, p. 737.

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the Civil Courts, but a spiritual jurisdiction carefully limited and defined, namely, the power of the Keys. Accordingly that document refers to a series of Acts of Parliament, which are the Acts in which the various gradual definitions of the jurisdiction of the Church are found, beginning with the first one, which placed the examination and admission of ministers in the hands of the Church, emphasizing the one which most fully defined the jurisdiction of the Church, but at the same time confining it to preaching, administration of sacraments, and correction of manners or discipline. The Protest was drawn up in 1842 by the majority, five to two, it may be, of the Established Church. That majority became the Free Church. It is written indeed by the majority, and so with a Free Church pen, and it was taken with them into the Free Church and there adopted as the first constitutional document of that Church. Now admittedly it mentions the Second Book of Discipline as a standard of the Church. The appellants must take the statement in the Protest as they find it, but they traverse it. The Second Book of Discipline never was a standard, although the majority asserted it as a standard. But the appellants are not alarmed at any reference to the Second Book of Discipline, even if it were a standard, as its terms cannot be raised into that general wide assertion of spiritual independence and right to legislate which the respondents seek to find in it. There is no support for that contention in the Second Book of Discipline. The Establishment principle is not only implied in the Protest, but made part of it by reference to the Confession of Faith. The Establishment principle was to be found deeply embedded, as might be supposed, in the Confession of Faith, and particularly under the head "of the Civil Magistrate," chap. 23, arts. 2, 3. (1)

These shew that the Confession of Faith recognised, not merely the authority, but, what is more important still, the duty of the civil magistrate—by which is understood the Government, in the widest sense—to take order that unity and peace be preserved in the Church, that the truth of God be kept pure and entire, that blasphemies and heresies be suppressed, that corruption and abuses in worship and discipline

(1) See Appx. E, p. 733.

be prevented or reformed, and all the ordinances of God duly settled, administered, and observed. That imposes the duty on the Government of at least establishing the Church. Referring again to the Protest of 1843 (to be immediately dealt with), at the end it claims that it shall be free to the members of this Church, or their successors at any time hereafter, when there shall be a prospect of obtaining justice, to claim the restitution of all "corporeal benefits and endowments" which they for the present had been compelled to yield up. Now that cannot be read as anything but adopting for their Church as one of its fundamental tenets the Establishment principle.

In the pastoral address, dated April 25, 1843, by the special commission of the General Assembly, a few days before the actual disruption, a passage (1), after referring to the ordinary civil administration, goes on: "But, in addition, the Christian magistrate". . . . "In that capacity he has many important functions" (inter alia) "For supplying the means of Grace." That contains not merely the Establishment, but the endowment principle. Then there is the "Protest of 1843" (May 18, 1843) (2), the first express document of the Free Church other than documents adopted. The Assembly adopted the Protest. That document clearly laid down as the constitution of this new Church what was set forth as the constitution of the Established Church in the document of 1842. The Protest of 1843 in its concluding paragraphs clearly set forth the Establishment principle: "and finally, while firmly asserting the right and duty" (the word "duty" is important) "of the civil magistrate to maintain and support in accordance with God's Word." The Protest further accepts the Confession of Faith as the standard of doctrine or creed of the Church. There can be no question that the Confession of Faith referred to is the Westminster Confession. On this point the communication addressed by order of the Assembly (May 20, 1843) to the members and friends of the Church is equally emphatic. The actings of May 18 were the acts of the majority of the former Assembly. They were the actings of those ministers and elders who separated from that Assembly. They had not yet carried

(1) Pastoral Address, ante, p. 530. (2) See Appx. G, p. 741.

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with them the body of the Church. This communication was, therefore, of the nature of a prospectus of the association addressed to the Church at large for the purpose of drawing adherents to the disrupting ministers and elders. In the address Dr. Chalmers's speech to the Assembly was incorporated. Of course, his words were spoken in his individual capacity as Moderator; but when they were inserted by the founders of the Free Church in this document addressed by them to the Church at large they became by adoption the utterances of the Church. Then on May 22 there is a resolution of the Assembly resolving the course to be taken (1): "That this Assembly do now for themselves and all who adhere to them separate from the Establishment, protesting that in doctrine, polity, and discipline they truly represent the Church of their Fathers"—that is, the Established Church; and they reappoint a committee with instructions to prepare the draft of an Act and deed "to be adopted and subscribed renouncing and demitting the State's rights and privileges held by virtue of the Establishment." That deed is called "An Act of Separation and Deed of Demission by Ministers." In that deed they declare that they "in no degree abandon or impair the rights belonging to them," "and that they are and shall be free to exercise government and discipline in their several judicatories separate from the Establishment, according to God's Word and the constitution and standards of the Church of Scotland as heretofore understood." There is also a similar deed of demission applicable to the eldership slightly differently worded. The Act of the Assembly dated May 30, 1843, was important, as enjoining the several presbyteries to record the Protest of 1843 and deed of demission at the beginning of their presbytery books, making more emphatic what was to be the constitution of the Church which they thus founded. The definition of what are the spiritual functions of the Church is to be found in the "Claim, Declaration, and Protest" of 1842. At the same time that document asserts the duty of the State to maintain and support the Establishment, and accepts as the standard of belief the Westminster Confession. The Lord Ordinary relied on the

(1) Ante, p. 531.

model trust deed (1); but its narrative, evidently drafted by a lawyer a year or two after the Free Church was already constituted, cannot in any sense be held to affect the constitution of the Church. It is full of inaccuracies historically. It was adopted by a committee, and came into general use. But it was never formally approved by the Assembly, although what might be called an adoption took place in 1851, when the Assembly instructed "That the model trust deed be printed and sent down with the Acts of this year." One of the inaccuracies in the narrative is that the Church of the Reformation adopted as standards the two books of discipline.

The respondents contended, and their contention was approved by the Lord Ordinary, that because the Free Church chose to insert in their model trust deed a provision for the contingency of union with such other body, or bodies, of Christians as the said "Free Church of Scotland may at any time hereafter associate with themselves," a power for union with other Churches was a part of their constitution, and that such union might take place irrespective of identity in essential principle. No doubt the Free Church as a body of beneficiaries, under deeds taken in this form, could unite with other associations; but the latter must come in under the Free Church constitution and adopt that constitution, and could not impose their own upon the Free Church. Now the Establishment principle was an essential doctrine of the Free Church. Had it not been so, there was no reason why they should not at once have gone over to one or other of the "voluntary" bodies already existing in Scotland. But the disestablishment principle was the doctrine of the United Presbyterian Church. Union can only follow on identity of principle. In their defences the respondents rely on the deed of 1846, "The Act anent Questions and Formula" (2), to be addressed to ministers on ordination, &c., as if it embodied the Church's constitution. The appellants demur to that. The constitution of the Church was fixed three years earlier, and this deed was only necessary in order to adapt the questions and formula required of ministers in the Established Church to the altered

(1) See Appx. H, p. 743. (2) See post, p. 598.

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position of the Free Church. The only alteration in the questions put to elders in the Free Church was that the Free Church formula omitted the words "ratified by law in the year 1690," and they omit the phrase "now settled by law;" but they do put this: "Do you sincerely own and declare the Confession of Faith" "to be the Confession of your Faith?" and "Do you own the doctrine therein contained to be the true doctrine which you will constantly adhere to?" When you examine the new formula of 1900 (1), which was adopted as part of the union proceedings to be used by the United Church, you will find a very different thing, and affording a marked contrast with the formula of the Established Church and the Free Church. (2) The contrast was between the use of the term "the foresaid Confession of Faith," which is "to be the Confession of your Faith" in the Established Church and in the Free Church, and the use of the term "the doctrine of this Church" in the United Church. The Act and "Declaration anent publication of the Subordinate Standards," 1851 (3), bears emphatically upon the Establishment principle, as well as upon the question what are the standards or creed. That document, which may be looked at on the principle of contemporaneous exposition, declared to be the standards of the Free Church, not anything which existed before the Westminster Assembly, nor any modification of the work of that body, but the Westminster Confession itself, and the subordinate standards which were provided by the Westminster Assembly. Accordingly, whatever may historically be the history of the Books of Discipline, they do not come within the ambit of the standards of the Free Church as there defined. Now what constituted the United Presbyterian Church? The component elements of the United Presbyterian Church were the "Relief Church," which went out from the Establishment in 1761. Although the Relief Church adhered to the doctrine, discipline, and government of the Established Church, there is no doubt that it had, by the time the Free Church came into existence, made large advances towards Voluntaryism: see

(1) Ante, p. 545. (2) Ante, p. 536.
(3) See Appx. I, p. 748.

Smith v. *Galbraith*. (1) The other element of the United Presbyterian Church was the "United Secession," made up of certain parts of the Secession Church of 1733, which also had adopted voluntary views. The union of the above two Churches took place in 1847 under the name of the United Presbyterian Church. That was three years after the foundation of the Free Church. At that date there must have been some difference between these Churches and the Free Church; otherwise, why did they not in 1847 unite with the Free Church? The Basis of Union of the United Presbyterian Church, its rules of procedure and its formula, are dated 1848. (2) This document cannot be read without coming to the conclusion that that Church is a voluntary Church; and, secondly, that its constitution is not a fixed constitution, but one capable of modification and alteration. Then we come to the negotiations for union in 1864. (3) As to Establishment, the two bodies, the Free and the United Presbyterian, could only express identity of views up to a certain point. It was admitted in the report on union of 1864 (3) that there was a distinct difference of view on the question of the Establishment between the two Churches, the one still holding the Establishment principle, and the other rejecting it. Nor can one read the proceedings of the United Presbyterian Synod in 1870 (4) without seeing that the object of the overture was to get rid from their Basis of Union of anything which could imply approval of the Establishment principle. Bringing down the negotiation for union to its eve, there were reports of the United Presbyterian Church Committee on the questions of disestablishment and disendowment (5) in 1897, and following years down to 1900, all of them adopted by the Synod, pledging that Church to a Disestablishment propaganda. The Synod of the United Presbyterian Church not only approved of the report, but instructed its committee "to embrace all fit opportunities of making its voluntary principles known throughout the Church and the community, and authorized it

(1) 15 S. 808; 5 D. 565.
(2) See Appx. K, p. 753.
(3) See Appx. L, p. 754.
(4) Ante, p. 539.
(5) Ante, p. 540.

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to support such Disestablishment Bill or resolution in Parliament." The appellants submit that the original Free Church constitutional documents of 1842–3 demonstrate that the Establishment principle was a distinctive principle of the Free Church in its origin, and therefore that adherence to it was one of the conditions of the trust upon which the property in question was held. Secondly, the appellants contend that it is equally beyond dispute that the Establishment principle was not a principle of the United Presbyterian Church, and consequently that it could not be a principle of the United Free Church.

Then as to the matter of doctrine, there has been a clear departure in the union from the Confession of Faith as the standard of doctrine. In 1843 the Free Church started with maintaining as the creed of the Church the Confession of Faith and the standards of the Church of Scotland "as hitherto understood." These words "hitherto understood" in the final paragraph of the Protest of 1843 had reference to the exposition contained in the previous parts of the Protest and of the Claim and Declaration of 1842. In 1844 there was a report as to admission of ministers and probationers from other Churches. The General Assembly remit to a committee to consider what alterations or additions might be required in the Established Church formula, and following on that the formula was passed. (1)

The Act of the General Assembly, May 30, 1846, enacted "that no minister of any denomination shall be admitted to a ministerial charge in this Church without an unqualified subscription of the formula"—that is, the minister to be received must approve the whole doctrine of the Confession of Faith. Then there was the Mutual Eligibility Act of 1873, and the relative Act anent the subscribing of the formula of 1874. These embodied a compromise between two parties in the Church. What was imposed on a United Presbyterian minister coming into the Free Church was the formula of the Free Church, with notice of what the Free Church principles were, and if he made no objection he was held to have accepted them.

(1) Act 12, 1846; post, p. 598

In the United Presbyterian Church a change had taken place in 1879. There was then passed a Declaratory Act which modified the Confession of Faith. (1) Contrast that with the Confession of Faith, and it will be seen how the latter is altered by this Declaratory Act.

The Declaratory Act, 1879, set out that "The doctrine of the Divine decrees, including the doctrine of election to eternal life"—that is, the doctrine of chap. 10 and head 4 of the Confession (2)—"is held in connection and harmony with the truth that God is not willing that any should perish, but that all should come to repentance, and that He has provided a salvation sufficient for all, adapted to all, and offered to all in the Gospel, and also with the responsibility of every man for his dealing with the free and unrestricted offer of eternal life."

Now that is not an interpretation, but is an absolute contradiction of the doctrine of chap. 10 of the Confession. Then the heads 3 and 4 are equally contradictory of head 3 of the Confession of Faith. Then, reading between the lines of head 5, it is seen to be a disapproval of State Establishment of religion, and head 6 is a clear statement of Voluntaryism, while head 7 practically supersedes the Confession by individual opinion. The result of the Declaratory Act of 1879 is to write out of the Confession of Faith the doctrine of predestination which is set forth in chaps. 3 and 10, and to read out of the section with reference to the duty of the civil magistrate the duty of the State to establish and provide for the Church. There was a similar Declaratory Act of the Free Church in 1892, evidently passed to bring it into line with the United Presbyterian Church with an eye to union. (3) That Act the appellants complain of, for it, too, was contradictory of and a practical rescission of chaps. 3 and 10 of the Westminster Confession. There were pretty numerous dissents against the passing of this Declaratory Act. The appellants represent the dissenting minority. The result was that the Declaratory Act of 1892 was qualified by the Act of 1894. (4)

It is asserted that by remaining in the Free Church after

(1) Ante, p. 539.
(2) See Appx. E, p. 730.
(3) Ante, p. 543.
(4) Ante, p. 544.

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the passing of these Acts the minority, now represented by the appellants, accepted them, and can now take no exception. But there was no call on them to leave the Church as well as protest. The time to take action was when something was done which touched property, and every step was resisted from 1896, when the respondents commenced their union campaign.

But the terms of the union documents themselves are most markedly condemnatory of the union. The respondents may call it an incorporating union; it is no such thing: it is a pure working agreement—a pooling of their funds. Further, it contains no definite constitution. The two Churches cannot come together without carefully providing by the resolution annexed to these Acts of Union that they shall have liberty from time to time to alter anything that may be deemed constitutional at will. The first document to be considered is the overture regarding union. (1) Then follows the Uniting Act itself. (2) The most careful examination of these will not disclose such terms of union as will result in a new homogeneous body with a defined constitution. The two so-called uniting bodies are practically each left to its own way, freed from the restrictions of its former constitution, but not brought under any new one, only making common cause in certain practical directions, and holding to a certain extent a common purse. That is not a state of matters into which the majority of the Free Church are entitled to drag the minority. Perhaps the abandonment of the old Free Church standard of doctrine is most marked. To its original constitution the Westminster Confession as a creed was essential. On the basis of this Uniting Act each of the uniting bodies may declare in the matter of doctrine what they like. The result is that the General Assembly of the United Church is but a joint committee of the two Churches appointed to administer the affairs of both, and therefore (inter alia) to apply Free Church Property to the uses of the United Presbyterian Church. The attempted union results, therefore, in a clear diversion of the Free Church property and funds. At every stage of these proceedings protests, dissents, and amendments were moved. There was no acquiescence. The

(1) Ante, p. 543 (2) Ante, p. 545.

matter of union is well illustrated by what had to be enacted in natural sequence, e.g., the Acts substituting officials, appointing trustees, and vesting property. All these were as ineffectual to divest property as they were necessary to attempt it. Further, as might be expected, neither Church accepted the other's formula, and a new one is passed on October 31, 1900 (1), with a preamble quite different from the previous preamble of the Free Church. But the important difference is the excision of any reference to the scriptural principle of the duty of the Civil Rules, and the substitution of the doctrine of this Church for that of the Confession of Faith. That alone is enough to shew that this so-called United Free Church is not the Free Church, and is not a body the conditions of whose association are the conditions upon which, in 1843, the Free Church left the Establishment, and on which the trusts of property were constituted.

The respondents contend that there was an inherent right to legislate vested in their Assembly, empowering it to alter doctrine and constitutional principle. They could not maintain this absolutely, and yet they never would, and probably never could, suggest any intelligent or rational limitation. Enough has been already said to shew that the Westminster Confession was a basis, and an essential basis, of the Free Church at its foundation. The belief of a Christian Church must be founded in general upon Holy Scripture; but what differentiates one sect or church from another is their accepted and crystallized definition of what they hold those Scriptures to contain—in other words their creed, such as in the Free Church case was the Westminster Confession: see *Dill* v. *Watson*. (2) If an association of Christians adopt any one creed as the basis of their association, no one can cut and carve upon it without altering the foundation upon which that body has been associated. Unless power to alter is provided, or there is inherent power to alter, alteration cannot be effected against the wish of a dissentient minority. Now there was no express power to alter; neither was there any inherent or implied power to alter. The respondents contend that

(1) Ante, p. 545. (2) (1836) 2 Jones Rep. (Ir. Ex.) 48.

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there is a common law right to alter doctrines by virtue of the legislative power inherent in the General Assembly acting through the majority of Assembly. They found upon Lord Cranworth's opinion in *Forbes* v. *Eden* (1); but the important distinction between the circumstances of that case and this was that the canons of the Episcopal Church had a passage empowering alteration: see Lord Chelmsford's opinion. Lord Cranworth's language is wider than his real meaning; all he really meant was that there was a power to make by-laws. But his Lordship's language cannot be stretched to support an unfettered and absolute legislative power to alter, not merely the incidentals of rule and order, but the foundation of the association. His judgment does not mean or infer inherent power to legislate in the wide and independent sense the respondents attributed to it. And Lord Eldon in *Craigdallie's Case* (2) guards himself by saying, if a religious body had made provision for alteration, that must be considered. In this case, if there was an inherent power to alter, it must be derived from the Church of Scotland, the true representative of which the Free Church claimed to be. But this was negatived by the statutory history of that Church from 1560 right on to the union of the Crowns. As the Free Church took the constitution of the Church of Scotland as its constitution, you must necessarily look back to what that constitution was. Now the Acts 1560 and 1567 (defining jurisdiction), 1561 (power to deal with ministers maintaining doctrines contrary to the articles of Confession—the power of excommunication), and 1592 (presbytery first organised), and the many others which have been referred to, all dealt with matters of order and discipline, and there was no suggestion in any one of them of reposing in the Church judicatories any legislative power. The very term "judicatories," always applied in the statutes and since to the Assemblies major and minor of the Church, is itself suggestive. Then the Act of 1690 settled the creed, and throws one back on the Act of 1592 as defining what the position of the Church was: see the Acts 1693 and 1707, c. 6. There were

(1) (1867) L. R. 1 H. L., Sc. 568, 582.
(2) 1 Dow, 1, 16; 2 Bli. 529; 21 R. R. 107.

four points at issue—the "Protestant Religion" (i.e., the creed), the "Worship," the "Discipline," and the "Government." The first was fixed; the latter was then provided for. There is no justification, therefore, from the statutory history of the Church of Scotland as it existed prior to 1843 for inferring that the Church had, according to its constitution as fixed by parliamentary action, the slightest inherent legislative power to vary anything which was fundamental to that Church as a Church. It had power, no doubt, to regulate and order its general affairs by canons or by-laws, but not to alter doctrine or anything else fundamental. Could it, for instance, alter its form of government from Presbyterian to Episcopalian?

Next, the respondents found on the Barrier Act of 1697 (1), and maintain that that Act was an assertion of the right to innovate in doctrine, worship, discipline, and government. The Barrier Act was not an Act of Parliament, but only of the General Assembly. That Assembly had been instrumental in obtaining the Acts of 1690 and 1693 ratifying the Confession of Faith and fixing the Presbyterian Church government as the only government of Christ's Church within this kingdom. Is it conceivable that four years afterwards the very same Assembly should be found asserting for itself a power, irrespective of the Crown and Parliament, to throw these statutes to the winds, and to alter both creed and government? And as the Barrier Act was preceded by the Acts of 1690 and 1693, so it was shortly followed by the Act of 1707, when the union of the Crowns was accomplished on the express basis of maintaining intact the religion, worship, discipline, and government of the Church of Scotland already unalterably secured. If there is a difficulty in ascertaining the scope of an Act, the title can be looked at (2) to shew what was in the mind of those who passed it. Here the title is "For Preventing of Innovations," not for enabling of innovations. Then the question was, Does the adjective "sudden" apply to "alteration or innovation or other prejudice"—does it apply to them all, or only to "alteration"? The appellants maintain that the

(1) See Appx. G, p. 736.

(2) *Fenton* v. *Thorley & Co.*, [1903] A. C. 443, per Lord Macnaghten.

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word "sudden" only applies to the word "alteration." In the original document in manuscript there is a comma after the word "alteration." The Act contemplated that the common sense of the Church, when it had a year to think, would be sufficient to protect the Church againt any innovation. But what was the Act directed to? Only the making of binding rules and constitutions—that is, regulations or by-laws. In laying down how these were to be adopted, the Church was really providing that in their adoption there should be a safeguard against any accidental or attempted alteration or innovation. There is no word in the whole Act which enables the Church to do anything. It is a limiting or preventative Act; and the Church's history for the 136 years which followed its passing down to 1833, when the ten years' conflict commenced, proves that the respondents' contention is wrong, for in all the Acts of Assembly of the Church of Scotland there is no one single Act to which the respondents can point as supporting their contention by shewing alteration or innovations affected by use of the forms of the Barrier Act. If there was this assertion of legislative power, where is the limitation of it except as a matter of procedure? The respondents must claim the power to alter and innovate, not merely doctrine, worship, and discipline, but government, and that they could under the Barrier Act turn the Presbyterian Church into an Episcopalian Church, or even a Mahomedan one. If they are right, the Church could abolish the Barrier Act itself to-morrow, and claim to alter and innovate without even its restrictive procedure. The respondents rely again on post-disruption examples of innovation under the Barrier Act—for instance, the changing the formula in 1846. But that was not an act of alteration or innovation. It was the logical sequence of disruption adopting the formula of the Established Church to the situation created by the disruption. Nor can the respondents rely on the union with the Secession Church in 1852, for the Secession Church de plano accepted the position of the Free Church. In that union there was no departure from doctrine or principle on the part of the Free Church. It may be here pointed out that the Established principle was of

the essence and very root of all the various Secession Churches at their origin. They only became Voluntaries after a long course of years. The respondents also rely on the Mutual Eligibility Acts of 1873 and 1874, allowing ministers of the United Presbyterian Church to become ministers of the Free Church. But the concession was carefully guarded, in that the said ministers had to accept the position of the Free Church. They can also place no reliance on the union with the Reformed Presbyterians in 1876, for the latter accepted without reserve the existing formula of the Free Church. The respondents further, feeling that their claim of inherent legislative power must have some limit, suggest as a condition or limitation of it that alterations or innovations made must not be inconsistent with the "identity of the Church." But it is asked, What defines the identity of the Church? Is it not the identity of the doctrines it professes? They also rely on the point that the Church first adopted of its own accord in 1560 Knox's Confession, and maintain that what it adopted it can change or discard. But their history is wholly fallacious. It is quite clear from the statutes that it was the State which adopted the creed. There was then no Church. The creed of the nation preceded the Church of the nation. In the Act of 1560 everything was done by the State.

Then as to the alleged adoption in 1578 as one of its standards of what is called the "Second Book of Discipline." (1) There is no doubt that book had its origin between 1578 and 1581 as the work of a committee of the Assembly of those days. In the Claim, Declaration, and Protest of 1842 there is the only important reference to it as a standard, and founding on its support of the position that a minister must receive a call from the congregation before he can be admitted to a cure of souls. But that is an incidental reference only to the book, and though it refers to it as one of the authorized standards, where these standards of the Church are deliberated and enumerated in 1851 (2), the Second Book of Discipline is not included. Now the Second Book of Discipline never was a standard of the Established Church. The

(1) See Appx. D, p. 727. (2) See Appx. I, p. 748.

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Church submitted the Second Book of Discipline to the Legislature for approval, and none of the powers which were claimed by it for the Church were ratified by Parliament except those specially set forth in the Act of 1592, which Act adopted certain passages from the Second Book of Discipline and rejected the rest. The history of the book is made clear from the Acts of Assembly set out in the "Book of the Universall Kirke." That was the general Church, as distinguished from particular churches. It was a long time before the Assembly became strictly an Assembly of the Church; in the earlier years barons and members of the Estates of Parliament as well as ministers attended. Then it was the practice to send up for consideration to the Crown and Parliament certain articles to be considered and passed into Acts—bills, in fact, submitted for Acts dealing with Church interests. It must be admitted, therefore, that at that period the Church did not set up as having any legislative power, but considered matters, and then sent them up to be dealt with by Parliament. And this book was just one of those things which was sent up for consideration, and a portion of which—a very small portion—was adopted, to the exclusion of the rest: Adoptio unius exclusio alterius. The Act of 1690 only re-enacts the Act of 1592. From the heading of the Second Book of Discipline, as printed in the edition produced by the respondents, one might suppose it was adopted by both the Acts of 1592 and 1690; but that is quite erroneous. Of the excerpts from the Second Book of Discipline the respondents chiefly found on chap. 7, s. 8 (1): "they," i.e., the Assemblies of the Church, "have power also to abdicate and abolish all statutes and ordinances concerning ecclesiastical matters." But s. 2 says Assemblies are of four sorts: "For other are they of particular Kirkis and congregationis ane or ma" (that is Kirk Sessions or presbyteries), "ather of ane province" (that is a Synod), "other of ane haill natioun" (that is the General Assembly), "or of all and diverse nationis professing ane Jesus Chryst" (that is Œcumenical Synods); and what follows is general of all these, and not confined to the General Assembly alone. It therefore

(1) See Appx. D, p. 727.

cannot be said that s. 8 imports an assertion of legislative power on the part of the Assembly when you find it has reference to Kirk Sessions as well as General Assemblies. It is quite true that they are (s. 6) to keep the religion and doctrine in purity, to keep comeliness and good order in the Church, that they may make rules and constitutions appertaining to the good behaviour of the members, and that power is asserted for them to abrogate all statutes and ordinances concerning ecclesiastical matters that are found noisome or unprofitable, or agree not with the time, or are abused by the people. But the whole purview shews that regulations or by-laws only were in the minds of the writers, and that they had no idea of asserting a right to legislate upon all matters fundamental to the Church's constitution. See also an emphatic assertion, not only of the duty of the State to establish, but also to endow the Church in chap. 10, arts. 1, 2, 5, and a sharp distinction drawn between what falls under the power of the Sword and what under the power of the Keys in s. 7. The Second Book of Discipline was in fact simply a book of ecclesiastical polity, parts only of which were adopted by the Act of 1592, but it never was a part of the Church's constitution. However, there is one portion of it which the disruption members in 1842, and the Free Church in 1843, did declare to be in their conception a part of the constitution, namely, the principle of non-intrusion enunciated in chap. 3, s. 5. It is for the respondents to define "as heretofore understood." They do define it, by saying that it was part of the constitution of the Church that no minister should be intruded upon the congregation. That had no effect at the time, because patronage survived for nearly 300 years after 1578. Disregarding history, the Free Church assert that they understood that to be part of the constitution of the Church. That understanding they certainly carried into the constitution of the Free Church. But how does that support their assertion of legislative power? It is further true that Acts of the Assembly in 1638 and the three or four following years were couched in legislative language. But the country was in chaos; Parliament and the Assembly in revolt; the country in fact governed by the

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Assembly and not by Parliament. From the usurpations of such an Assembly you cannot deduce constitutional rights unless by subsequent adoption these usurpations become constitutional. The situation was this: in 1618 King James promulgated his five articles of Perth. These articles tried to introduce popish, or at least episcopal, rites and ceremonies, and first roused the country. Then Charles I. brought about what is called the Second Reformation by issuing his canons and constitutions ecclesiastical, but more particularly by the endeavour to impose on Scotland "Laud's Service Book." These Acts of the prerogative roused Scotland. There were certain committees called the "Tables," which committees practically, in conjunction with the Assembly, governed Scotland for ten years. In February, 1638, the Covenanters swore to the National Covenant, and in the end of that year the first General Assembly that had met for many years was called, and passed all the Acts the respondents rely on. But then it must be remembered that a few months after the Covenanters were in arms against the King. Charles found himself unable to oppose them, and instead he, in 1639, made a treaty with them. Though they legislate in words in their Assembly, by virtue of that treaty they at once go to the King for a ratification in Parliament of all they had attempted to do: see the book called "The Acts of the General Assembly of the Church of Scotland," pp. 9, 21, 36. One term of the treaty was that a lawful General Assembly should be held; and it was held in 1639—an Assembly on a very different footing from the rebellious Assembly of 1638: see the "Act containing the Causes and Remedies of the Bygone Evils" (1); see also Lord Justice-Clerk Inglis in *Forbes* v. *Eden*. (2) The independent position assumed by Parliament during the same time is shewn by a reference to their Acts. (3) Again, the respondents found on the adoption of the Westminster Confession in 1649 as a recognition of legislative power. But all that is done

(1) Acts of the General Assembly, 36, 41.

(2) (1865) 4 M. 143, 156.

(3) 5 Thomson's Acts, 593, 599, 601, 602; 6 Thomson's Acts, 150, 270, 271, 276; Husband's Collection of Printed Orders, 1646, p. 208.

must be read in the light of the history of the period. Although the Assembly adopt the Westminster Confession in terms ex facie absoluto, their Act is at once submitted to Parliament for ratification; it is the parliamentary action which is effectual. (1) These two episodes in the history of Scotland do not establish anything like a legislative power in the General Assembly of the Church. Then we come to actings of the Church in 1833 to 1843, the ten years of ferment which initiated the disruption. The Acts of these years were Acts of internal regulation which hardly deserve the name of legislation. Nevertheless in passing them the Assembly incidentally interfered with civil rights depending on statute, and so stepped beyond its power. So little were they regarded as Acts of legislation that the provisions of the Barrier Act, about which so much has been heard, were not observed except in the case of the Veto Act of 1835. They were treated merely as Declaratory Acts, and not as in any way altering doctrine, discipline, or government. The Veto Act which immediately caused the disruption was "An Act on the Calling of Ministers." (2) This did pass the Barrier Act. Even this could hardly be called legislation, for it merely amounted to the laying down by the Church for the Church of the method by which ministers were to be admitted to the charge of congregations. To the Church had been committed by statute the examination and admission of ministers. What it did by the Veto Act would have been quite within its function, if it had not proceeded on lines which injuriously affected civil rights protected by statute. What it did is no ground for saying that the Church had legislative power. The disruption documents of 1842 and 1843 make it perfectly plain what was meant by the words "as heretofore understood." They must be read with reference to the non-intrusion struggle which preceded, and the issue of which caused the disruption. What the Church was then striving for they styled in the Claim and Protest of 1842 and 1843 spiritual independence—the independence of the Church in matters spiritual. But this assertion of spiritual independence was, when the surrounding history is reviewed, clearly seen to be

(1) 6 Thomson's Acts, 161. (2) Ante, p. 529.

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the assertion of the right of the Church uncontrolled by the Civil Courts in spite of patronage to regulate the calling and induction of its own ministers. It amounted to nothing further. Lastly, this judgment cannot stand in the face of the Kirkintilloch case (*Craigie* v. *Marshall* (1)) and the Thurso case (*Couper* v. *Burn.* (2)) These are direct authorities, so far as the Supreme Court is concerned, in favour of the appellants.

It is difficult to imagine that the Barrier Act was intended to give the Church the liberty of altering the Confession of Faith, or of altering the Presbyterian Church government, having in view that in 1690, 1693, 1703, and 1707 these were solemnly ratified and established. Further, the statutes provided machinery which made it absolutely impossible—at all events clearly in the views of any Assembly—to alter the Confession of Faith. Great light is thrown on what were the essential doctrines of the Church by seeing what were the declarations made by those who entered it as to what in their view was fundamental, and both the Established Church and the Free Church provided machinery by which they secured that the creed of the Church and the form of Church government should be unalterable in all time coming.

The Declaratory Act of 1892 (3) of the Free Church was really passed for the purpose of enabling people who could not conscientiously subscribe the Confession of Faith to enter the Church, and there is a great similarity between the objects of the Declaratory Act of the United Presbyterian Church, for there were men of the modern school of theology who felt it difficult to become office-bearers in the Free Church when the Free Church required a rigid adherence to the Confession of Faith in all its parts. In fact, the contract of union allowed each party to it to entertain their own views about theological subjects. The whole creed might be ultimately reduced to a few propositions. Under the Apostles' Creed you could have a Christian Church, but not a Calvinistic Church. The union threw the whole of the Free Church religion loose, and the

(1) (1850) 12 D. 523, 559. (2) (1859) 22 D. 120.
(3) Ante, p. 543.

elders and congregation might be compelled to admit to ministrations and sustain out of the trust funds persons who held views diametrically opposed to the Confession of Faith.

Asher, D.F., and *Haldane, K.C.* (with them *Guthrie, K.C.*, and *Orr*), (all of the Scottish Bar except the second), for the respondents. The question is whether the property which belonged to the Free Church in 1900 now belongs to the appellants or to the respondents. Now the property (see condescendence 46) was not given upon any specific trust beyond what is implied from the fact that it was given to the Free Church. Then what is to be determined is, What were the conditions and limitations under which the Free Church held the property, and have they, in effecting a union with the Presbyterian Church, so infringed these conditions and limitations as to forfeit all right to the property? The person giving the money in effect said, "I give it to the Church, and in giving it to the Church I delegate it to the Church to deal with it according to the whole scope of the Church's power; I put no limitation on the Church, and I do not in giving it to the Church say it is to be subject to any specific restriction." If it can be shewn that the Church had power to do so, they can spend it as they please—that is, if its constitution includes a power to alter the particular destination of the property. What is said is that the union has caused the Free Church to be no longer the Free Church in the sense of holding the property which belonged to the Free Church, on the ground that by the union the Free Church has renounced what is called the Establishment principle, and that it has also effected a change in its doctrines; and the contention is that both acts were beyond its powers. The respondents' answer is that neither has been done in fact; and even if they have been done in fact both are within the powers of the Free Church. There is nothing which can be termed a "form" of constitution of the Free Church, and accordingly a "form" has to be discovered from the circumstances under which the disruption took place, and a consideration of the documents which were written and exchanged at that time,

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along with other circumstances as to what were the rules which bound the Free Church with reference to the administration of its property. Now the circumstances under which the party which became the Free Church left the Establishment are of vital importance. Their view of their own position was that they had become the "Church of Scotland Free"; that they were not a new Church, but had shaken off the fetters of Establishment; that they carried with them all the standards of the Church, with the difference that, being no longer connected with the State, they dropped the statutes as they were no longer a State Church and took the standards of the Church of Scotland, as they expressly stated, "as heretofore understood"; and that they entirely dropped the Confession of Faith as having any statutory status in the Church. They said, "We take the Confession of Faith subject to certain qualifications which we declare we hereby attach to them." The words "as heretofore understood" lie at the root of the case. The Free Church party when in the Established Church always maintained, in opposition to the moderate party, that the Church did not owe its existence to the State, that the Church had adopted the original Confession of Faith as a Church, and that the statutes which had been passed from time to time recognising the Establishment by their terms left the Church absolutely free in spiritual matters. The moderate and opposite side contended (and their contention was upheld by the law) that the statutes defined what were the rights of the Church, and that whenever any question arose in regard to the title of the Church to do a particular thing, then that had to be determined by an examination of the public statutes which had established the Church. There was that opposite current of thought running through the Church for a long period of time. In short, one view was that the Church was a Church by its own inherent power as a member of the Body of Christ, and the other that the Church was an institution sanctioned by law, established by statutes, and the limits of its power determined by the construction of the statutes. It was that which led to the disruption, the immediate cause being the Chapel Act, May 31, 1834, and the

Veto Act, May 29, 1835. The majority asserted the right on the part of the people of every congregation to reject a presentee, and that majority (afterwards the Free Church) claimed that view upon the ground that it necessarily followed from Christ being the Head of the Church, and there being no civil power in the Church apart from Him. That the Church had the power within itself of regulating matters of that kind, and that the civil law could not interfere. That was the attitude of the party who became the Free Church, and that is the basis upon which they established their Church. Another document, the resolution of May 23, 1838 (1), throws light on their attitude. That formulated in the Assembly the Free Church party position as absolute spiritual independence, and that the acceptance of that would be laid upon every person, ministers, office-bearers, and members of the Church. The above documents laid the train for all the cases which followed, and when the decision was against the majority they said, "Very well, it now being declared that the law is different from what we contend, we cannot remain in the Establishment, and accordingly we leave it for the purpose of becoming a Church free"—that is to say, free to carry out the principles for which they had contended. The chief cases were as follows: The first Auchterarder case (*Earl of Kinnoull* v. *Presbytery of Auchterarder*) (2); the second Auchterarder case (*Earl of Kinnoull* v. *Ferguson*) (3); third Auchterarder case (*Earl of Kinnoull* v. *Ferguson*) (4); second Strathbogie case (*Presbytery of Strathbogie* v. *Minority of the Presbytery*) (5); first Strathbogie case (*Edwards* v. *Cruickshank*) (6); third Strathbogie case (*Cruickshank* v. *Gordon*) (7); Culsalmond case (*Middleton* v. *Anderson*) (8); Stewarton case (*Cuninghame* v. *Presbytery of Irvine*) (9); Lethendy case (*Clark* v. *Stirling*). (10) These cases bring out the attitude of the party which formed the Free

(1) See Lord Macnaghten's opinion, post, p. 632.
(2) (1838) 16 S. 661; (1839) Macl. & Rob. 220. See report of *Auchterarder Case*, by Charles Robertson, Edinburgh, 1838, 2 vols.
(3) (1841) 3 D. 778.
(4) (1843) 5 D. 1010.
(5) (1840) 2 D. 585, 587.
(6) (1839) 2 D. 258, 282.
(7) (1843) 5 D. 909.
(8) (1842) 4 D. 957.
(9) (1843) 5 D. 427.
(10) (1839) 1 D. 955.

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Church, and they demonstrated that that attitude was one of complete spiritual independence and power to regulate their own affairs: see specially the judgments in the *Stewarton Case*. (1)

As to the legislative power, the Free Church party in 1843 asserted that there was legislative power within the Church, and they constituted themselves at the disruption upon that principle. The Act of Assembly, dated June 8, 1847, brings out very sharply the views of the Free Church as to their legislative power; as also the Catechism issued a few years after the disruption by the unanimous resolution of the Free Church. The Free Church adopted the Confession as an act of the Church, and, having adopted it, they might substitute for it a new Confession, and there was nothing to prevent them rejecting it; for the same power which enabled them to adopt it enabled them to dispense with it. They complied with the prescribed form. Question 231 (2) in the Catechism brings that out very sharply. Just as the Church could in 1560 of its own motive decide to make John Knox's Confession the Confession of the Church, so they have power to change. The position taken up by the Free Church unanimously (almost immediately after it was formed) was that the faith which it then professed was due entirely and exclusively to the Church's own act, and that it had adopted it freely and of its own will; and it necessarily followed that the body that can adopt can make a change. If a Church accepts the status of Establishment on the basis of accepting a particular Confession, then there is a contract between the Church and State which compels the Church so long as it is a party to the contract to adhere to that Confession. But where the Church is apart from the State altogether, and where there is no person with a title to interfere except individual members of the Church, then the case comes to this: that the basis on which the members associated was a basis which entitled certain alterations to be made from time to time. And all who joined the Church must be assumed to have known that they were joining a body who had assumed and exercised that power. For example, where a person joined

(1) 5 D. 427. (2) See Appx. N, p. 760.

the Church in 1843 and found a certain creed adopted, the question would arise, How did it become the creed of the Church? The answer was, it became the creed, as the Catechism says, by the voluntary adoption of the Church.

The Act of Assembly, July 4, 1562 (1), is an illustration of

(1) "PART II.

"ACTS OF ASSEMBLY.

"*A.*—DOWN TO 1843.

"1. *4th July* 1562.

"Touching the removeing of Idolatrie, the Kirk now, as of before, concludes humble supplication to be given in to her hienes, but the manner how, they have referred to farther consultation of her Majesties Secret Councill.

"That supplication be made to her hienes for punishing of all vyces commanded by the Law of God to be punished, and yet not commanded be the law of the realme, viz., blasphemie of God's name, contempt of his word and Sacraments, profanation of the saman be sick as were not lawfully called to the ministration thereof, perjurie and the taking of the name of God commonlie in vaine, breakers of the Sabbath day. In keeping of common mercats, adulteries, fornication, filthie talking; and further, that punishment be execute upon the transgressors of the last proclamation made against massmongers and hearers.

"Anent the actiones of divorcement, to make supplication to the Secret Councill, that either they give up universallie the Judgment of divorce to the Kirk and their Session, or else to establish men of good lives, knowledge and Judgement, to take the order thereof; provyding allwayes that the saids Lords make provisione and ordinance how the guiltie Persons shall be punished.

"And sua dissolvet this Assembly, and appointed to conveen again the 25th day of December nixt to come in Edinburgh.

"(Sic subscribitur) JOHN GRAY.

"2. 1566. *Confession of Helvetia Approved.*

"The Assemblie being advised with the interpretatioun of the Confessioun of the Tigurine [i.e. Zurich] kirk made by Mr. Robert Pont, ordeaneth the same to be printed, together with the epistle sent by the Assemblie, allowing the same, providing a note be putt in the margin of the said Confessioun, where mentioun is made of the remembrance of some holie days, &c. In this Confessioun, superioritie of ministers above ministers is called an humane appointment; confirmatioun, a device of man; baptisme by weomen is condemned; prolixe prayers, hindering the preaching of the Word; canonicall houres, that is, prayers to be chanted, and often repeated at sett times, as the Popish maner is, heaping up of ceremoneis to the prejudice of Christian libertie, observation of sancts' dayes. But this Assemblie would not allow the dayes dedicated to Christ, but tooke exception against that part of the Confessioun; yea, our Assembleis meete often upon the 25th of December, so that manie of the ministrie could not be at home in their owne parishes, to teache upon Christ's nativitie. This Confessioun, called commounlie the Latter Confessioun of Helvetia, was allowed not onlie by the Kirk of Scotland, but also Geneve, Savoy, Pole, Hungarie; but not the Kirk of England, becaus of the manie

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the Church accepting a Confession of Faith, but only in part—taking exception to certain parts which it does not accept: see also Act of Assembly, 1581. Referring to the Book of Discipline, Lord Justice-Clerk Hope said no doubt, if the Church had got the Book of Discipline recognised by the Church, then, "they would have had the power to do anything they liked, because the powers presented for the Church in the Book of Discipline are so large." With regard to the Free Church, now that they are away from the State and took the Book of Discipline with them, they must be held to have all these extensive powers, which Lord Justice-Clerk Hope said would have belonged to them as an Established Church if the Book of Discipline had been recognised by the State. In the Act of Assembly, 1590, there is again a reference to the Book of Discipline, and in the Act of July 4, 1591, subscription to the Book of Discipline is insisted on. Then see the Acts, December 6, 1638, and December 8, 1638. (1) These Acts prove that the

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corruptions mainteaned by them, which are condemned in it. . . .

"4. *April* 1581.

"Forswameikle as Travells has been taken in the forming of the Policie of the Kirk, and diverse Sutes made to the Magistrate for approbation thairof; quhilk albeit as yit hes not takin the happie Effect quhilk gude men wald crave, yit that the Posteritie sould judge weill of the present Age, and of the Meining of the Kirk: The Assemblie hes concludit that the *Buik of Policie* agriet upon in diverse Assemblies before sould be registrate in the Acts of the Kirk, and to remaine thairin ad perpetuam rei memoriam; and Copies thairof to be taken be everie Presbyterie. . . .

"7. *Julii* 4, 1591.

"Anent the Subscription of the *Buik of Policie* injoynit in the last Assemblie, in respect the greatest Part of the Presbyteries as yit hes not satisfiet the Ordinance of the Kirk; the Assemblie hes ordaynit the former Act to be observit and execute betwix and the nixt Assemblie, and the Moderator of everie Presbyterie to sie to the Execution therof under the Pain of 40 Pound to be employit to the Use of the Puir besyde the publick Rebuke in the opin Assemblie.

(1) "*December* 6, 1638. *Condemning the Service Book, Book of Canons, Book of Ordination, and the High Commission.*

"I. The Assembly having diligently considered the Book of Common Prayer, lately obtruded upon the reformed Kirk within this realme, both in respect of the manner of the introduction thereof, and in respect of the matter which it containeth, findeth that it hath been devised and brought in by the pretended prelats without

Free Church took with them the legislative power and authority which the Church of Scotland had historically. If they were a legislative body, then it will have to be shewn that

direction from the Kirk, and pressed upon ministers without warrand from the Kirk, to be universally received as the only forme of divine service, under all highest paines, both civill and ecclesiasticall; and the book it self, beside the popish frame and forms in divine worship, to containe many popish errours and ceremonies, and the seeds of manifold and grosse superstition and idolatrie. The Assembly, therefore, all in one voice, hath rejected and condemned, and by these presents doth reject and condemne the said book, not only as illegally introduced, but also as repugnant to the doctrine, discipline, and order of this reformed Kirk, to the Confession of Faith, constitutions of Generall Assemblies, and Acts of Parliament establishing the true religion; and doth prohibite the use and practice thereof, and ordaines Presbyteries to proceed with the censure of the Kirk against all such as shall transgresse.

"II. The Assembly also taking to their consideration the book of Cannons, and the manner how it hath been introduced, findeth that it hath been devised by the pretended prelats without warrand or direction from the Generall Assembly, and to establish a tyrannicall power in the persons of the pretended bishops over the worship of God, men's consciences, liberties, and goods; and to overthrow the whole discipline and government of the Generall and Synodall Assemblies, Presbyteries, and Sessions formerly established in our Kirk.

"Therefore, the Assembly, all in one voice, hath rejected and condemned, and by these presents doth reject and condemne, the said book, as contrare to the Confession of our Faith, and repugnant to the established government, the Book of Discipline, and the acts and constitutions of our Kirk, prohibits the use and practise of the same; and ordains Presbyteries to proceed with the censure of the Kirk against all such as shall transgresse. . . .

"9. *Act of the Assembly at Glasgow, December* 8, 1638, *declaring Episcopacie to have been abjured by the Confession of Faith*, 1580, *and to be removed out of this Kirk.*

"The Assembly, taking to their most grave and serious consideration, first, The unspeakable goodnesse and great mercy of God, manifested to this nation, in that so necessarie, so difficult, and so excellent and divine work of reformation, which was at last brought to such perfection that this Kirk was reformed, not only in doctrine and worship, but also, after many conferences and publick reasonings, in divers nationall Assemblies, joyned with solemne humiliations and prayers to God, the discipline and government of the Kirk, as the hedge and guard of the doctrine and worship, was prescribed according to the rule of God's Word, in the Book of Policie and Discipline, agreed upon in the Assembly 1578, and insert in the register 1581, established by the acts of Assemblies, by the Confession of Faith, sworn and subscribed, at the direction of the Assembly, and by continuall practise of this Kirk. . . ."

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they have done something which limits their power to be able as the Free Church to legislate about anything.

[LORD JAMES. Suppose they made such a change as virtually to accept the doctrine of the Church of Rome, would it be the same Church?]

That would depend entirely upon the extent of its power to change. A body can never cease to be the same body by exercising its inherent powers. If it does something which extinguishes itself, then it is non-existent; but if the body is constituted in such a way as that it has the inherent power to do something, so long as it is only exercising that power it is merely fulfilling one of its own functions. The respondents are not prepared to say that the Church could do anything that would be inconsistent with the position of being a Church of which Christ is the only Head and His Word the only standard. If the true definition of the position of the Church of Rome would make it fall within what is described as the basis of this Church, then the Free Church could have gone back to Rome. They could have made any alteration they liked on the Confession of Faith.

The Church changed the adoption of Knox's Confession for the Westminster Confession; yet there were differences between these Confessions. They were not identical on election; Knox's was much stronger. Then the Westminster Confession was much stronger on the Sabbath. The Church adopted the latter with the view to natural uniformity, and the Church in departing from one and taking the other was simply exercising its inherent power, and it followed they had the power to alter. The same power which enabled them to adopt the Confession enabled them to alter it. They not only voluntarily adopted the Westminster Confession of Faith, but they examined its terms, finding them satisfactory; and they adopt it with qualifications, shewing that they felt themselves entitled to have rejected it altogether if they chose. That was a very clear exercise of the Church's inherent power.

The Acts of Assembly are similar. The Church considered it had power by its own inherent legislative power to exclude Episcopacy. The Church refused to obey the five articles of

Perth. The first of the Barrier Acts was in 1639, and there was a complete sequence of them to 1697; but the title at the beginning is not a part of the Act; it was merely a docket put on by the officials of the Assembly. The Barrier Acts were never intended to confer a power which the Church assumed that it had at that time inherently, but were for the regulation of the exercise of the power. Principal Hill (1) and Dr. Cook (2) (authorities in ecclesiastical law) both support the view that there was an inherent legislative power in the Church. The documents establish that historically the Church had an inherent legislative power, and exercised that power on a great variety of matters as far back as there was record, and passed the Barrier Act for the purpose of regulating the manner in which the legislative power was to be exercised. And, further, the terms of the Barrier Acts shewed the Church had within its scope matters relating to doctrine, discipline, and government. The question is not in fact what was the power, but what was the power the Free Church party claimed in 1843; and it is enough for the respondents to shew that the Free Church in 1843 had a certain theory of what were the powers of the Church, which they had maintained during the disruption period, and that that theory they put forward as their view of the position of the Church, and that they founded their Free Church upon that theory. Then in the "Claim, Declaration, and Protest" (3) there is nothing to justify the view that the Church made the question of Establishment an essential or fundamental principle of the Church. What the essence of the Church they were founding was that they were the Church of which Jesus Christ was the Head, and that no temporal power had any right to interfere with them at all. That was the essence, and not that of Establishment. What they said in effect in that declaration was: "Here are the statutes which have been passed for a long period of years, and the passages which give the Church exclusive jurisdiction in

(1) View of the Constitution of the Church of Scotland, by Rev. George Hill (3rd ed.), 1835, p. 4.

(2) Practice of the Church Courts of Scotland, by Rev. J. Cook (1882 ed.), pp. 287–9.

(3) See Appx. G, p. 737.

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spiritual matters; and although these statutes have been interpreted against us, we now appeal to the State to readjust matters, so that we may be put into the position these statutes legitimately led us to think it occupied." To say "They would deprecate any breach of connection between Church and State" is not the way to speak of a fundamental principle. They regret the breach; but it is another thing to say that the connection between the Church and State is a fundamental and essential principle which cannot under any circumstances be abandoned. They nowhere in these documents said that Establishment was a fundamental principle. In the Protest, although maintenance and support is spoken of, it is not spoken of as an essential principle of the Church, but simply as a matter which those who joined in the Protest regarded as a proper duty on the part of the State.

The clause relied on by the appellants is a clause which when properly construed is expressive of an opinion retained on the part of those who were protesting with regard to the duty of the magistrate, and not inserted there in any sense with the purpose of formulating an essential principle of the Church as it was to exist after its separation from the Establishment. It was a view with regard to a third party altogether external to the Church, not necessarily involved in any of the Church's functions, but really more a matter of economics than of fundamental faith, and accordingly it did not belong to the category of questions which could not be dealt with according to the will of the Church when it became thoroughly constituted as an independent Church. Dr. Chalmers is merely expressing an opinion when he speaks of the Government giving of its resources to maintain the Gospel, and he sums it up by saying, "We are the advocates"—upon a contentious matter upon which there was a great variety of opinions—"for a national recognition and a national support of religion, and we are not Voluntaries." The speech was merely a sort of public proclamation of the circumstances under which they were placed, but not in the sense of making an offer as a contract with all and sundry on the basis of that document. The model trust deed is one of the most important documents. It takes

its origin in the Act of 1844. The meaning of the words "Church to be identified as in the model trust deed" was that the terms of the model trust deed were to be taken as a guide. Here the minority represented by the appellants was less than one-third, and the case has not arisen which is provided for in the Act. The model trust deed was not merely a draft. It received the approbation of the Assembly, Act 1844, and the Assembly approved the report of the deed. Then on the separation the draft was unanimously approved of and recommended for adoption to the several congregations of the Church; and, further, the model trust deed is printed in the proceedings of the Assembly of 1851 with the Acts of the Assembly. In these circumstances it is out of the question to contend that the model trust deed was not one of the most authoritative documents, and it brought more in detail before all the adherents of the Church what was the constitution of the Free Church. The document frequently called attention to what was essential and fundamental: "It was at all times an essential doctrine of the said Church and a fundamental principle in its constitution that there is no other Head of the Church but the Lord Jesus Christ." Now there is not a word there about Establishment, and there are many other passages to the same effect. If the Church had intended to put forward as one of its great principles the maintenance of the constant striving to keep up the Establishment, surely they would have told the people in the parishes that if they formed themselves into a congregation in connection with the Free Church that that was one of their principles. Any congregation that joined the Free Church agreed to have the question what was the identity of the Free Church identified by the model trust deed; and therefore, as far as the congregation was concerned, the model trust deed was exclusive of everything else. The trust is defined, and the 4th clause shews the relation of the General Assembly to the Church: "Trustees to be subject in all things to the General Assembly"; so that the property was really placed subject to the control of the Assembly. What was the Free Church—for the purposes of the deed—was determined by the 9th and 10th clauses, which

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provided for possible contingent disruptions. The appellants have left the Free Church because they refused to unite. Therefore, if it is held that the appellants are right, that they are the Free Church, then it is not disputed that the respondents have cut themselves off from them, as the respondents have refused to accompany the appellants into the position which they took. There is, therefore, a cleavage in the Church. If the appellants had been in the proportion of a third, the 9th clause would have applied to their case; but they are not nearly a third. But the clause does apply to the respondents, for they are more than a third—in fact, nearly the whole Church. The difficulty is that they are more than a half, and, therefore, not a minority. It does seem an extraordinary thing that when the Church separated from the Establishment in 1843, if the duty of the civil magistrate to maintain and support the Church was an essential and fundamental principle of the Free Church, that in the model trust deed there is not a single word about Establishment. The questions to deacons in the Act 1846 (1) coincide with the view that from beginning to end

(1) "XIV.—ACT XII. 1846—ACT anent QUESTIONS and FORMULA.

"WHEREAS it has become necessary, in consequence of the late change in the outward condition of the Church, to amend the Questions and Formula to be used at the licensing of probationers and the ordination of deacons, elders, and ministers respectively, the General Assembly, with consent of a majority of Presbyteries, enact and ordain that the following shall be the Questions so to be used, and considering that the formula to this Act subjoined embodies the substance of the answers to the said Questions, the Assembly appoint the same to be subscribed by all probationers of the Church before receiving licence to preach the Gospel, and by all office-bearers at the time of their admission: And the General Assembly, in passing this Act, think it right to declare that while the Church firmly maintains the same Scriptural principles as to the duties of nations and their rulers in reference to true religion and the Church of Christ for which she has hitherto contended, she disclaims intolerant or persecuting principles, and does not regard her Confession of Faith, or any portion thereof, when fairly interpreted, as favouring intolerance or persecution, or consider that her office-bearers by subscribing it profess any principles inconsistent with liberty of conscience and the right of private judgment.

"I.—ELDERS AND DEACONS.

"*Questions to be put before Ordination.*

"1. Do you believe the Scriptures of the Old and New Testaments to be the Word of God, and the only rule of faith and manners?

"2. Do you sincerely own and de-

the Free Church took their stand upon spiritual independence as that which was essential and fundamental, and nothing else.

clare the Confession of Faith, approven by former General Assemblies of this Church, to be the confession of your faith; and do you own the doctrine therein contained to be the true doctrine, which you will constantly adhere to?

"3. Do you own and acknowledge the Presbyterian Church government of this Church, by Kirk-Sessions, Presbyteries, Provincial Synods, and General Assemblies, to be the only government of this Church; and do you engage to submit thereto, concur therewith, and not to endeavour, directly or indirectly, the prejudice or subversion thereof?

. . . .

"II.—PROBATIONERS.

"*Questions to be put to Probationers before they are Licensed to preach the Gospel.*

"1. Do you believe the Scriptures of the Old and New Testaments to be the Word of God, and the only rule of faith and manners?

"2. Do you sincerely own and believe the whole doctrine of the Confession of Faith, approven by the General Assemblies of this Church, to be the truths of God, contained in the Scriptures of the Old and New Testaments; and do you own the whole doctrine therein contained as the confession of your faith?

"3. Do you sincerely own the purity of worship presently authorised and practised in this Church, and also own the Presbyterian government and discipline; and are you persuaded that the said doctrine, worship, and discipline, and Church government, are founded upon the Holy Scriptures, and agreeable thereto?

"4. Do you believe that the Lord Jesus Christ, as King and Head of the Church, has therein appointed a government in the hands of Church-officers, distinct from, and not subordinate in its own province to, civil government; and that the Civil Magistrate does not possess jurisdiction or authoritative control over the regulation of the affairs of Christ's Church; and do you approve of the general principles embodied in the Claim, Declaration, and Protest, adopted by the General Assembly of the Church of Scotland in 1842, and in the Protest of Ministers and Elders, Commissioners from Presbyteries to the General Assembly, read in presence of the Royal Commissioner on 18th May 1843, as declaring the views which are sanctioned by the Word of God, and the standards of this Church, with respect to the spirituality and freedom of the Church of Christ, and her subjection to Him as her only Head, and to His Word as her only standard? . . . .

"6. Do you promise that in your practice you will conform yourself to the said worship, and submit yourself to the said discipline and government of this Church, and not endeavour, directly or indirectly, the prejudice or subversion of the same?

"7. Do you promise that you shall follow no divisive courses from the doctrine, worship, discipline, and government of this Church?

"8. Do you renounce all doctrines, tenets, or opinions whatsoever, contrary to, or inconsistent with, the said doctrine, worship, discipline, and government of this Church?

"9. Do you promise that you shall subject yourself to the several

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And the office-bearer or probationer who joined the Church, in accepting the Confession of Faith, is left free as regards conscience and private judgment on the matter of the duty of the civil magistrate, and that accordingly, at the very beginning of the Free Church, you have that liberty of individual opinion in the Free Church which was exactly the basis of the union in 1900. In the Act 1846 "nothing in the Confession of Faith is held as favouring persecution" applies to all parts of the Confession of Faith which relate to the civil magistrates, including that of the establishment of religion. The Act 1851 certainly recognises the duty of a Church as far as possible to carry out a union. The above-mentioned documents shew that the duty of the civil magistrate was not an essential principle.

Dr. Candlish, the most prominent man next to Dr. Chalmers, in dealing with addresses received from other Churches, gives his guidance as regards doctrine of Establishment. (1)

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judicatories of this Church? Are you willing to subscribe to those things?

"III. PROBATIONERS, AFTER BEING CALLED BY A CONGREGATION.

"*Questions to be put to Probationers before Ordination, (and also to a Minister already ordained, at his admission to a Pastoral Charge).*

. . . .

"2. Do you sincerely own and believe the whole doctrine contained in the Confession of Faith, approven by former General Assemblies of this Church, to be founded upon the Word of God; and do you acknowledge the same as the confession of your faith; and will you firmly and constantly adhere thereto, and to the utmost of your power assert, maintain, and defend the same, and the purity of worship as presently practised in this Church?"

(1) "And will the Assembly allow me in closing to say that I trust there will be no mistake in reference to the sentiments I hold of other bodies of evangelical Christians. My friends will bear me witness that I am the very last person who would stand on the rigid assertion of the mere theory of Establishments for the purpose of keeping up division or schism in the Church. So far from that, it appears to me that the distinct refusal of the states and kingdoms of this world to recognise the only principle on which we can consent to have the Church established —their refusal to establish the Church of Christ while they recognise her spirituality and freedom—leaves us to a very great degree of practical liberty and a large measure of practical discretion as to the terms on which we should stand with other Churches. Is the division and schism of the Christian Church to be kept up by a question as to the duty of another party" (that is, the State) "over whom we have no control? Let it be that we maintain our

Then we come to 1858, when the Assembly deliberately adopted the view that there was nothing in the union of the Free Church with the United Presbyterian Church in the Colonies which in any way affected the relations between the Colonial branch of the Free Church and the Free Church at home. The basis of the union with Victoria (1) is an example of the union in Nova Scotia, New Zealand, Queensland, and South Australia, and the Scottish Free Church refused to support the minority, and told them to go back to the fold they had left. Then as to the Mutual Eligibility Act, 1873. Prior to 1843 members of the Colonial presbyteries had been treated as Free Church ministers, and any ministers holding a parish in the Colonies were eligible for a Free Church call in Scotland without subscribing or doing anything to shew that their principles were in accordance with the Scottish Free Church. In 1873 the same privilege was extended to United Presbyterian ministers. No doubt that last Act was not passed unanimously, but the Act proceeded necessarily on the view that there was no essential difference between the United

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different opinions as to the duty of the State to support the Church, and the duty of the Church to receive support from the State when it is given consistently with spiritual freedom: still, shall that question, which has become a mere theoretical question in the Church of Christ, and which, so far as we can judge, seems destined to be a theoretical question till the time when the kingdoms of this world shall become the Kingdoms of our Lord and of His Christ, —shall that question prevent cordial co-operation and harmony among ourselves, and our united action in defence of our common Protestantism against a common foe?"

(1) "Bases adopted in Unions recently consummated among Presbyterian Bodies in the British Colonies." They included the United Presbyterian Church as well as the Free Church. The first is, "That the Westminster Confession of Faith, the Larger and Shorter Catechisms, the form of Presbyterian Church Government, the Directory for Public Worship, and the Second Book of Discipline be the standards and formularies of the Church. (2.) That, inasmuch as there is a difference of opinion in regard to the doctrines contained in these standards relative to the power and duty of the civil magistrate in matters of religion, the office-bearers of this Church, in subscribing these standards and formularies, are not to be held as countenancing any persecuting or intolerant principles, or as professing any views in reference to the power and duty of the civil magistrate inconsistent with the liberty of personal conscience or the right of private judgment."

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Presbyterian Church and the Free Church which should prevent a minister of the one becoming a minister of the other. That also goes to shew that the Establishment principle was not a vital principle of the Free Church. Then in the Act of 1892, "Anent Confession of Faith," there was no alteration of doctrine which it was not competent to the Free Church to make. The main point of that Act was to emphasize that view of that part of the Confession of Faith which dealt with free "offer of salvation to all men," as distinguished from the "foreordination of man to death." The Confession of Faith was never anything but a subordinate standard. The standard was the Scriptures, and neither Knox's nor the Westminster Confession professed to be infallible, and therefore they leave to the Church the interpretation of Scripture and the reconciling of the Confession of Faith with Scripture where, in the opinion of the Church, the Confession of Faith deviates from Scripture. The book "Sum of Saving Knowledge" had for ages been one of the subordinate standards of the Church. It is mentioned in the Act of 1851, which was the publication of the subordinate standards of the Church. It was spoken of as a practical application of the Confession of Faith. The Church was doing all it could to meet the difficulties which were entertained in men's minds with regard to a rigid and absolute unmodified acceptance of all views however extreme. The Established Church could not make any alteration in their standards without the consent of the State; but what was the use of freedom if the Free Church were not entitled to adjust the standards of their Church from time to time so as to meet difficulties in regard to the question to probationers and deacons, "Do you abjure and reject the Arminian heresy?" There was nothing in the Free Church formula which denied election; they combine always with the free offer of salvation the operation of God's grace by way of election. But they do extend the election doctrine so as to make it applicable to all those who repent and believe. The Act of 1892 merely gave formal expression that it was the duty of the Church in the circumstances, finding that the existing formulas were bars in the way of the Church doing her duty; it was her

duty to consider the situation relative to that difficulty, and to make it plain what in the estimation of the Church was their interpretation of those phrases which to many minds appeared contradictory and ambiguous in the Confession of Faith. The appellants complain of the Act of Union of 1900, that the preamble authorizes probationers to take advantage of any of the Acts cited, namely, the Act 1647, the Church approving of the Confession of Faith (we say with qualifications), Act XII., 1846, of the Free Church Declaratory Act of 1879, of the United Presbyterian Church Act XII., 1892, with relative Act, 1894, of the Free Church. These all have been referred to except the Act of 1879 of the United Presbyterian Church. There the two doctrines, predestination and the free offer of salvation, were enunciated. Therefore there was nothing in the basis of union which effected any change. It was merely introduced as being a standard of the United Presbyterian Church side by side with the Acts of the Free Church. And the Act of 1879 is not substantially different from the Act of the Free Church of 1892. The position of the two Churches as regards Establishment was the same; there never was any imposition upon an office-bearer of the United Presbyterian Church of any view as to Voluntarism as a standard, and accordingly in the United Presbyterian Church there were plenty of people in favour of Establishment. No doubt the larger number were against it, and resolutions were passed in favour of disestablishment, but that did not affect the unity of the Church, because there was nothing in the United Presbyterian Church which imposed any particular view about Voluntaryism in that way. There was diversity of view and complete freedom of opinion upon the matter. In these circumstances the respondents submit there was nothing in the union of 1900 which to any extent involved a departure from the principles of the Free Church. Taking the standards of the two Churches, and putting them in juxtaposition, there was nothing in regard to their general articles of faith which could be said to differentiate the one from the other; and in regard to the relations of the civil magistrate to the Church, there was nothing

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in the standards of either Church which precluded the union in this country any more than in the Colonies. A word as to the Second Book of Discipline. The Free Church carried it into their constitution for the purpose of exercising free from the State altogether all the powers of a complete spiritual independence. Spiritual independence meant absolute power with regard to everything spiritual in connection with the Church, and, having placed that as a fundamental doctrine, they are supreme, and, if unanimous, independent of every doctrine of the Church. Further, when a case comes before a tribunal of appeal which has to decide matters of doctrine, it is within the strict rule of evidence to look to works of authority upon the matters of doctrine which emerge even though not put in evidence in the Court below: *Read* v. *Bishop of Lincoln.* (1)

Now the first question was, Did the Free Church do anything by the Act of 1892 which was inconsistent with the Confession of Faith? What the respondents most strongly contest is that it would be proper, consistently with the standards of knowledge, for this House or any other Court to hold that the maintenance of the doctrine of predestination was inconsistent with the maintenance of the doctrine of the free offer of the Gospel to all sinners without distinction. These are two propositions which are held together by every Church, and which Christians of nearly every denomination say can be held together, either on the ground that the matter is a mystery which is not for them to inquire into, or on the ground that these conceptions are easily capable of being conceived as reconcilable if the proper speculative view is kept in mind. That is enough for the respondents, if they can shew first of all that the Confession recognises the Scripture as paramount, and then that these doctrines are distinctly laid down side by side in the Scripture itself. Now in the Act of 1892 there are two doctrines referred to and adopted. The doctrine of predestination is only referred to, and the doctrine of the offer of the Gospel to all is substantially affirmed. It was an emphatic statement of that side in contrast with the

(1) [1892] A. C. 644.

somewhat greater stress that is laid in the Confession of Faith upon the doctrine of predestination, and the only question which the House has to determine is, Is there anything in that statement, judged not simply by the unskilled interpretation of the "plain man," but according to the light of contemporary theological knowledge, which constrains the Court to hold that these two doctrines are inconsistent? The test is stated in the Confession of Faith itself. (1) It refers back for the test of validity to the Scripture itself; and consequently, if you find in the Scripture that the two doctrines are stated with the same apparent antithesis as appears in the Declaratory Act and other documents of the same kind, then these documents are to be read, not as affirming contradictory propositions, but as affirming two propositions, each of which is to be found in Scripture, and both of which are to be accepted. The Scriptures enunciate the doctrine of predestination (Acts 13, v. 48); also there is a distinct offer of salvation to all men (Romans 5, v. 18). The offer of the Gospel is in John 3, v. 16; 1st Ep. to John 2, v. 2; Colossians 1, v. 23; 1st Ep. to Timothy 2, vv. 4, 6; Titus 2, v. 11; 2nd Ep. of Peter 3, v. 9; and see Article 17 in the Prayer Book. The question was, Did people give their property to this Church in support of a doctrine opposed to the doctrine in the Declaratory Act? The two are not opposed. There is great confusion current regarding the difference between Arminianism and Calvinism. Calvin himself taught the offer of the Gospel to all men. The contradiction between the two doctrines was this: Arminius held that the source of man's salvation—of his power to take avail of the offer of the Gospel—lay in his own will alone; while Calvinism asserted that it also lay in the sovereign grace of God, and depended on the will of God in

(1) "(IX.) The infallible rule of interpretation of Scripture is the Scripture itself; and therefore, when there is a question about the true and full sense of any scripture (which is not manifold but one), it must be searched and known by other places that speak more clearly. (X.) The supreme Judge, by which all controversies of religion are to be determined, and all decrees of councils, opinions of ancient writers, doctrines of men, and private spirits, are to be examined, and in whose sentence we are to rest, can be no other but the Holy Spirit speaking in the Scripture."

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manifesting that sovereign grace. That was the real difference between the two. The question was, Had the Free Church at the beginning made the assertion of the Calvanistic theory in an extreme form a condition of their trust—that is, the doctrine of predestination—in such a form as to exclude the possibility of the offer of salvation to all men? So little have the appellants regarded it as contradictory, that they have preached the offer of salvation every Sunday, as do all ministers. The fact is that in practice the two are treated as reconcilable, because it is seen that the notion of the contradiction arises simply from the pictorial and anthropomorphic images we form of the Divine Will as operative in space and time, and as a thing having some casual relation to another thing separated from it—the will of the human being. The Free Church taught the two views as consistent as the Scripture taught them as consistent. It is impossible to hold that two doctrines are contradictory which occur in the Scripture juxtaposed with one another. It was laid down in the Synod of Dort that the two were to be held together.

[EARL OF HALSBURY L.C. The Synod of Dort denounced Arminians, deprived them of all their property, and exiled them if they would not abandon the Arminian doctrine. They took a good practical view of what was necessary to suppress what they called heresy.]

The respondents cannot admit that this is Arminianism. The doctrine of Arminius was that the source of man's salvation lay in his own will, and not in the Will of God; and that was condemned. The appellants contended that in the statement in the initial paragraphs of the Act of 1892 there was a doctrine contradictory to the doctrine of the Westminster Confession. There is no admitted contradiction between foreknowledge and foreordination to salvation or the reverse of the particular individual, and the free will of that individual. You must hold the doctrine of predestination consistently with the free will of man to accept what is offered to him, and it is these two doctrines which are laid down in the Confession of Faith and in this Declaratory Act with almost equal distinctness. Nor can you overlook the fact that there is in the

formula of the Free Church a denunciation of Arminianism. Whoever comes into the Free Church comes in on the basis of the Declaratory Act—renouncing Arminianism in express terms. They must have had something intelligible in their minds, and what was intelligible was that they held this doctrine as a doctrine which was consistent with the Calvinism of the Confession. Calvin himself preached this doctrine: Calvin's Commentary on the Gospel of St. John. Commenting on the words "that whosoever believeth on Him may not perish," he says "that it was a remarkable commendation of faith that it frees us from everlasting destruction." Shortly, what occurred in the Confession of Faith was this: There were two things, the one foreordination by God, and the other the free will of man and the freedom of the offer which is made to man; and these two are held by theologians as consistent with each other. The Confession of Faith did not assert one to the exclusion of the other.

The point of predestination was not raised in the record or in the Court below; therefore it arises in this House for the first time.

[EARL OF HALSBURY L.C. That is so; but we have the materials before us, and must deal with them.]

There ought to have been a proof in the Courts below of what expert theologians thought of the matter. The *Lincoln Case* (1) is therefore relevant. However, the respondents' contention is that the two sides of the doctrine are asserted in Scripture, and there arises an antinomy (an apparent contradiction) between two principles which conflict, which are not to be judged from the standpoint of the plain man, or in a merely anthropomorphic fashion. The Westminster Commissioners, desirous of not letting one side of the antinomy be asserted to the exclusion of the other, laid stress upon the first; but both sides are in the Westminster Confession. And those who put forward the "Sum of Saving Knowledge" (2)—a Westminster doctrine drawn by a Scottish Commissioner, and a subordinate standard of the Free Church (see Free Church Act,

(1) [1892] A. C. 644.
(2) Called a Practical Application of the Doctrine of the Confession.

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1851)—were of opinion that there was nothing in the Confession of Faith which prevented them from regarding the two as part of a homogeneous whole of doctrine: see arts. 4, 6, 7, 9, 10; chap. 2, arts. 2, 3. In chapter 2 there is a definition of God. The 3rd article contains the doctrine of the Trinity stated in the most abstract form, which is as incomprehensible a mystery as is the doctrine we are dealing with. It is laid down as part of the most systematic reasoning and most profound systems of speculative thought that inconsistency not only does not arise, but it is even blasphemous to assert that a man's will is not free to this extent—that although predestined and controlled by the will of God, he is at the same time free and responsible for the acceptance or non-acceptance of the offer of salvation: Taylor's Elements of Metaphysics (1903), 362; see also Bradley's Ethical Studies, 19; Vatke's Die Menschliche Freiheit (1841 ed.), 414.

[THE EARL OF HALSBURY L.C. mentioned a translation of the minutes of the discussion of the Westminster Confession by the librarian of the British Museum, Archbishop Ussher's Formula of Irish Articles, and an extract from the Council of Constantinople, 1642, which his Lordship translated.]

There it is said, "By the Will of God alone." That is just what Vatke condemned in St. Augustine, that he rode that doctrine to death; he put in the word "alone." In the Confession of Faith you find two standards apparently in contradiction; but you are warned that they are not really a contradiction, but that it is a high mystery, and it is enough to say that the Church said this is a mystery to be received as a matter of faith, and therefore that there cannot be any contradiction. Dr. Chalmers's Prelections on Butler's Analogy (1849 ed.), 312, 313, stated that Calvinism and the free offer of the Gospel for him, Calvinist as he was, went together: see also his Institutes of Theology, vol. viii. 403–407; (1883 ed.), 319; and Canon Mozley on the Augustinian Doctrine of Predestination. It has been the view, not only of the Free Church, but of the Established Church before them, to teach both these doctrines as not irreconcilable.

Now what sort of Church did the Free Church seek to

found in 1843? The question may be conceded to be one of contract and of trust springing from that contract, and the question is what was that contract and what was the trust. It was a trust "for behoof of the Free Church," and the question is what the Free Church meant. The principal object of the disruption was not to get rid of Establishment, but to shake themselves free of the interference of the Civil Courts, and to be able to determine all the controversies raised for themselves. The identity of the new Church consisted, and was intended to consist, in its form of government. A Church does not depend for its identity on its doctrines. It is an organization on a democratic basis which, like a living organism, preserves its form amid the changes of its material. The limit to what the Church could do was that they could not, by what is called an act of apostacy, put an end to the identity of their organization. If the Church committed such an act as to disentitle it to be called the Free Church founded under the Headship of Christ and the teaching of His Word, then it would cease to be the beneficiary under the trust for the Free Church. But so long as it retained its identity as a Church, the fundamental principle of which was the Headship of Christ, it could adopt or modify or change its doctrines. If they had a government which was supreme and exclusive in matters of doctrine, then they could change the doctrine. The test of personal identity of the Free Church lies not in doctrine, but in its life—in the continuity of its life—as ascertained by the fact that the majority have continuously kept on doing these things assumed to be within their competency—in other words, of its government. Then as to property, the Free Church intended to put its property at the disposition of the General Assembly, which had power over doctrine and exclusive jurisdiction: see the fourth purpose of the trust deed. Stress must be laid on what was done in 1843, before there was any talk of property to found a Church—that is to say, an organization with a particular form of government based upon the constitution of the old Established Church as understood by the Free Church. Its identity depends, just as does the identity of a club, on whether its constitution at a particular time is the

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work of the majority acting in general meeting within their powers. What was its nature? The Free Church was absolutely exclusive by the intention of its founders, as manifest in their documents and in their actings, of the power of the Civil Courts to enter and scrutinize their documents. There could have been no power to raise any question of interdict upon the question whether the formula changed the Confession. There could have been no power to question the power of the Church in commissioning a minister to preach the true Gospel. It was the province of the Church to determine the question of doctrine, and the Civil Courts were bound to accept the interpretation which the contract assigned to the Church exclusively. Now, what has the Church done? After all it has entered into a union with the United Presbyterian Church, preserving the things which we have described as the only essentials. The Free Church are entirely at one with the United Presbyterians on the Headship of Christ, His Word as the only rule of faith, and the Presbyterian form of government. There are minor matters also on which they agree—the duty of the civil magistrate to observe religion, observance of the Sabbath, law of marriage, and so on—both falling short of a duty at any time to set up a form of Establishment. The Free Church in 1900 made what might be called an interpretation of their principles as they were held in 1843. It may or may not have been an alteration; but if so, it was an alteration to give effect in the completest fashion to their paramount purpose—the preaching of the Word of their Master. That was an object the two Churches held in common, and the Free Church considered that it was entitled to subordinate the manner to the measure, and to put that forward. They considered it was within their competence, because they held in 1843 that the first thing they had to do was to constitute themselves a Church with certain powers; that the property had been put, not on certain defined trusts like the congregational property in *Craigie* v. *Marshall* (1), but at the disposal of the Church acting through the majority, which had in express terms, by the fourth purpose of the model trust deed, power to direct in all respects how the

(1) 12 D. 523.

trustees should dispose of that property. They considered in those circumstances that they were free. In the union they do not ask any one to give up any doctrine as to Establishment; they say, "This is so unimportant that we allow everybody to hold their own view." Doctrine is not part of the component parts of the identity of this Church. It consisted of an organization of persons on a permanent basis for the purpose of worship, which implied Church government and the power to change doctrine. The identity and continuity of life of the Church consists in the continuity of the Church and its government in the hands of a majority of individuals—a democratic constitution, which exists so long as the office-bearers continue to fulfil their function of being the office-bearers into whose hands, according to their principle, Christ their Head has delegated government for the purpose of the teaching of His Word as it is in the Scriptures. So long as they do that according to Presbyterian forms they remain continuously in the Church, and their actings and the history of their doings are the key to the identity of the Church at any particular period, and the key to the particular question of who are the beneficiaries, when any question is raised in a Court of law as to who is entitled to the funds held for behoof of the Church. The contention of the respondents is that, if they are right in their contention, the question of the doctrine for the time being, whether in Church polity or in the interpretation of the Confession—or the alteration of the Confession, for that matter—is within the jurisdiction of the Church Courts. It is part of the original foundation that that was to be the rule of the organization.

Henry Johnston, K.C., in reply.

The House took time for consideration.

Aug. 1. EARL OF HALSBURY L.C. My Lords, in this case the pursuers complain of a breach of trust, the trust being for the behoof of the Free Church of Scotland, and the breach of trust alleged being the use of certain property being, as alleged, no longer used for the behoof of the Free Church of Scotland,

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but for the maintenance and support of another and a different body, namely, the United Free Church. That body was formed in 1900, and consisted of a certain number of those who professed to belong to the Free Church of Scotland and others who, up to the time of the union, had belonged to the United Presbyterian body. They purported to unite and to exclude from their communion, or, at all events, from all participation in their organization, those who refused to unite in the new body, and have, of course, used the funds of which they claim to be the beneficial owners for the use of the new united body.

This is the breach of trust complained of, and the question is whether that complaint is well founded.

Now in one sense there can be no doubt what was the original purpose of the trust. It was for the maintenance and support of the Free Church of Scotland.

What was the Free Church of Scotland in 1843 can hardly admit of doubt. The reasons which those who separated themselves from the Established Church of Scotland then gave for their separation are recorded with distinctness and precision, and I do not think there can be any doubt of the principles and faith of those who came out from the Church of Scotland and described themselves as the Free Church of Scotland. Their name was significant: they claimed to be still the Church of Scotland, but freed from interference by the State in matters spiritual.

It was to the persons thus describing themselves that the funds in dispute were given, and until the union of 1900 with the other body we do not hear of any difficulty having arisen in the administration of the trust.

Now, however, the new body has established a new organization, it is alleged to profess new doctrines, and its identity with the Free Church, for whose behoof the property was settled, is disputed; and it accordingly becomes necessary to consider in what consists the identity of the body designated by the donors of the fund as the Free Church of Scotland.

Speaking generally, one would say that the identity of a religious community described as a Church must consist in the unity of its doctrines. Its creeds, confessions, formularies,

tests, and so forth are apparently intended to ensure the unity of the faith which its adherents profess, and certainly among all Christian Churches the essential idea of a creed or confession of faith appears to be the public acknowledgment of such and such religious views as the bond of union which binds them together as one Christian community.

If this be so, there is no lack of material from which to deduce the identity of the Free Church of Scotland. Its founders left their claim, declaration, and protest to stand for all time as a clear exposition, both of their reasons for leaving the Church of Scotland when they did leave it and as a profession of their faith as the true Church of Scotland, though separated from the Establishment, which in their view was itself heretical from its submission to the temporal power in what they regarded as exclusively spiritual.

Now, in the controversy which has arisen, it is to be remembered that a Court of law has nothing to do with the soundness or unsoundness of a particular doctrine. Assuming there is nothing unlawful in the views held—a question which, of course, does not arise here—a Court has simply to ascertain what was the original purpose of the trust.

My Lords, I do not think we have any right to speculate as to what is or is not important in the views held. The question is what were, in fact, the views held, and what the founders of the trust thought important.

Fortunately your Lordships have the authority of most learned judges, their decisions now reaching back for something like a century, which I shall quote somewhat copiously as laying down the principle upon which such questions as are now in debate should be determined. Commenting on what Lord Eldon said, Lord Moncreiff in Scotland and Sir William Cusack Smith in Ireland, have expressed themselves in a manner which I think may well be applied to the matter now in debate. Lord Eldon said (*Craigdallie* v. *Aikman* (1)): "With respect to the doctrine of the English law on this subject, if property was given in trust for A., B., C., &c., forming a congregation for religious worship; if the instrument provided for the case

(1) (1813) 1 Dow, 1, 16.

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of a schism, then the Court would act upon it; but if there was no such provision in the instrument, and the congregation happened to divide, he did not find that the law of England would execute the trust for a religious society, at the expense of a forfeiture of their property by the cestuis que trust, for adhering to the opinions and principles in which the congregation had originally united. He found no case which authorized him to say that the Court would enforce such a trust, not for those who adhered to the original principles of the society, but merely with a reference to the majority; and much less, if those who changed their opinions, instead of being a majority, did not form one in ten of those who had originally contributed; which was the principle here. He had met with no case that would enable him to say, that the adherents to the original opinions should, under such circumstances, for that adherence forfeit their rights.

"If it were distinctly intended that the Synod should direct the use of the property, that ought to have been matter of contract, and then the Court might act upon it; but there must be evidence of such a contract, and here he could find none. He proposed, therefore, that the cause should be sent back with two findings, of this nature: (1.) That the ground appeared to have been purchased and the house built for a society united, and proposing to continue united in religious opinion. (2.) That it did not in point of fact appear how this property was to be applied, in case the society should happen to differ and separate."

Lord Moncreiff said in *Craigie* v. *Marshall* (1), quoting Lord Eldon in *Craigdallie* v. *Aikman* (2): "'If it were distinctly intended that the Synod should direct the use of the property, that ought to have been matter of contract, and then the Court might act upon it; but there must be evidence of such a contract, and here he could find none.' He, therefore, proposed to remit the cause with two findings. Accordingly it was remitted with very precise findings, importing that it appeared sufficiently as matter of fact, that the ground was purchased, and was to be used for religious worship 'by a number of persons agreeing

(1) (1850) 12 D. 523, at p. 560. (2) 1 Dow, 1, 16.

at the time in their religious opinions and persuasions, and, therefore, intending to continue in communion with each other,' and that the society had acceded to a body called the Associate Synod; but that it did not appear, as matter of fact, 'for what purpose it was intended at the time such purchase and erections were made, or at the time such accession took place, that the ground and buildings should be used and enjoyed, in case the whole body of persons using and enjoying the same should change their religious principles and persuasions, or if in consequence of the adherence of some such persons to their original religious principles and persuasions, and the non-adherence of others thereto, such persons should cease to agree in their original principles and persuasions, and should cease to continue in communion with each other, and should cease, either as to the whole body, or as to any part of the members, &c., to adhere to the Associate Synod.' With these findings the cause was remitted for further consideration.

"There is no ambiguity in the principles on which Lord Eldon made this remit. Under the remit the Court ordered a condescendence, with a view to the ascertainment of the matters of fact, whether there was a real difference in the religious principles or not; and afterwards pronounced an interlocutor, the result of which was, that the Court found that the pursuers 'have failed to condescend upon any acts done or opinions professed by the Associate Synod, or by the defenders, from which this Court, as far as they are capable of understanding the subject, can infer, much less find, that the defenders have deviated from the original principles and standards of the Associate Presbytery and Synod; farther find, that the pursuers have failed to render intelligible to the Court on what ground it is that they aver that there does exist at this moment any real difference between their principles, and those of the defenders,' &c.; and, therefore, found it unnecessary to enter into the inquiries which had been directed by the House of Lords, under the supposition that the defenders had departed from the original standards and principles of the Association."

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In *Dill* v. *Watson* (1) Smith B. in Ireland on the same subject said: "Again, I do not conceive that I appeal from the Word of God to that of man, by proclaiming or attesting by my signature, that I concur in the interpretation given by a numerous body of my fellow Christians to certain passages of Scripture. They agree with me, I agree with them in construction and consequent creed; but neither take their belief upon the authority of those others. Both draw their faith from the Bible as its common source; both consider the Bible as containing the only rule of, and furnishing the only unerring guide to a true faith; each, with God's assistance and the subordinate and pious aid of human instruction, interprets as well as man's infirmity will permit; both coincide in the same interpretation; that interpretation regulates their faith; and all who thus coincide become members of the same religion. And thirdly, we do not coerce our neighbour by calling for his signature to our profession or articles of faith. We leave him free to adopt or to repudiate that faith, according as his reason, his conscience, and the grace of God may direct him. We but say to him, If you agree with us affix your signature to certain articles, or in some way notify your recognition of their truth; or if you disagree, withhold such signature or declaration. And we say of him, in the former case, that he *is*, and in the latter case that he *is not* of our religion. We do not compel him to hold our faith; we but ask him to inform us, by certain acts, whether he does hold it or does not; and we ask this, only if he claim to be enrolled as one of our body, and to be in religious communion with us. In the absence of such a test, our Establishment would not be a rock, cemented into solidity by harmonious uniformity of opinion, it would be a mere incongruous heap of, as it were, grains of sand, thrown together without being united, each of these intellectual and isolated grains differing from every other, and the whole forming a but nominally united while really unconnected mass; fraught with nothing but internal dissimilitude, and mutual and reciprocal contradiction and dissension. Hic dextrorsum abit; ille sinistrorsum. This indeed I should hold to be,

(1) (1836) 2 Jones Rep. (Ir. Ex.) 48, 91.

in the language of a late prelate, 'a Church without a religion.'"

The principles for decision thus propounded have been recognised and acted upon ever since, and it would seem that it may be laid down that no question of the majority of persons can affect the question, but the original purposes of the trust must be the guide.

Under these circumstances it would seem to reduce the question in dispute to an examination of the evidence as to what is the difference between them, if any, and if that difference does or does not accord with the original purpose of the trust; but in examining this question one has to bear in mind, not what we or any other Court might think of the importance of the difference, but what the donors of the trust fund thought about it, or what we are constrained to infer would be their view of it if it were possible to consult them.

The first point in dispute is very plainly set forth by the pursuers in the 13th condescendence. After pointing out in the 10th condescendence that the Free Church of Scotland was a voluntary association or body of Christians associated together under a definite contract involving the maintenance of definite principles, the condescendence 13 proceeds thus: [His Lordship read it as given above, with the respondents' answer. (1)] These then, my Lords, are the two contentions upon which the first part of the controversy depends.

My Lords, I cannot doubt that upon this head there is an overwhelming body of evidence in favour of the pursuers. Indeed, two of the learned judges have stated in express terms that originally the Free Church did profess what has been conveniently called the Establishment principle, though, for reasons which will be dealt with hereafter, they do not think that those who now represent the Free Church are bound by that original opinion.

My Lords, I am unable to understand by what test I am to ascertain what the donor of a fund has made essential to his gift, unless it is by what he has said or written, and when I find that the Free Church invited support by the circulation

(1) Ante, pp. 548, 555.

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of Dr. Chalmers' address, what can I say but that he expresses the views of the Church that he represents? "By giving up your connection with the State, and thus separating yourselves from the worldly advantages of such a connection, you may be said to have withstood a great temptation to sin in one form; but such is the deceitfulness of the human heart that without the heedfulness and the humility which Apostles of old so pressed upon the early converts, there is danger of being carried away by temptation in another form—and temptation, too, to the very same sin. Rather than be seduced from one of your greatest principles, you have given up one earthly dependence; but let principle have its perfect work, and have a care lest you be tempted from even the best (ought to be "least") of your principles by the promises and the allurements of another earthly dependence. Rather than compromise the authority of Christ over the affairs of His own Church, you have forfeited the countenance of men in power, that is, who have the power of this world's authority on their side. Beware of compromising another of your doctrines or articles of faith; and in the defence of which the Church of Scotland did lately signalize herself under the authority of Christ, over the kings and governments of earth, and the counterpart of this government, to uphold religion in the world; beware, we say, of making any compromise or surrender of this your other principle, and this, too, to gain the countenance of those who may still be called men in power, that is, who have the power if not of authority and office, have at least the power of numbers on their side. This may be termed a less principle than the other, of inferior consideration in itself, and inferior consequence to the vital or spiritual well-being of Christ's Church upon earth. But let us not forget what the Bible says of those who break even the least of the commandments, that they shall be called least in the Kingdom of Heaven. The men who stand opposed to us on this second, or as many choose to term it, this secondary question, might, with all the hay and stubble and wood of this, and it may be of other errors, be reposing on the like precious foundation with ourselves. They might be men with whom we differ, and yet with whom we can agree to

differ. They might be coadjutors in the great work of evangelizing the people of our land—brethren with whom we can hold sweet and profitable counsel on the capita fidei or weightier matters of the law, having one faith, and one Lord and one baptism. But we shall not, even for their friendship, violate the entireness of our principles, or make surrender of the very least of them. It is not for those ministers of Christ whom I am now addressing, and who, on the altar of principle have just laid down their all—thus quitting and for the sake of one principle the friendship of men who have the power of office—it is not for them to give up another principle for the sake of courting the friendship of men who have the power of numbers. We must not thus transfer ourselves from one earthly dependence to another. We have no other dependence than God. We acknowledge the authority and will submit to the influence of no other guide than His eternal and unalterable truth as seen in the light of our own consciences. To be more plain let me be more particular. The Voluntaries mistake us if they conceive us to be Voluntaries. We hold by the duty of government to give of their resources and their means for the maintenance of a Gospel ministry in the land: and we pray that their eyes may be opened, so as that they may learn how to acquit themselves as the protectors of the Church, and not as its corruptors or its tyrants. We pray that the sin of Uzziah, into which they have fallen, may be forgiven them; and that those days of light and blessedness may speedily arrive, when kings shall be the nursing fathers and queens the nursing mothers of our Zion. In a word, we hold that every part and every function of a commonwealth should be leavened with Christianity; and that every functionary, from the highest to the lowest, should in their respective spheres do all that lies in them to countenance and uphold it. That is to say, though we quit the Establishment, we go out on the Establishment principle—we quit a vitiated Establishment, but would rejoice in returning to a pure one. To express it otherwise, we are the advocates for a national recognition and a national support of religion, and we are not Voluntaries."

It would probably be admitted by all that the authority of

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Dr. Chalmers as an exponent of the views of the Free Church could hardly be overrated; but it was not his personal view merely. The words were addressed by him as Moderator, and were adopted unanimously, and directed to be circulated by the Assembly.

My Lords, I am reluctant to render longer what I have to say by literal quotations from authoritative declarations of the Free Church; but though I summarize, I am actually using the language which originally and for a long period afterwards those who spoke on behalf of the Free Church have said and written: "The Free Church has ever highly valued her connection with the State." "Firmly asserts the right and duty of the civil magistrate to maintain and support an Establishment of religion in accordance with God's Word." "They" (the Free Church) "reserve to themselves and their successors to strive by all lawful means to secure the performance of this duty." "The State was bound to establish and endow the Church." "The Free Church has not in the least degree altered its views respecting the lawfulness and the desirableness of a right connection between Church and State." "History and experience have convinced us" (the Free Church) "that there is a form of alliance which is at once practicable and agreeable to Scripture and highly beneficial."

My Lords, I cannot doubt that each of the utterances I have quoted is important, and to my mind conclusive evidence that originally at all events the views of the founders of the trust were in favour of the Establishment principle. The question whether they were fundamental or susceptible of being changed demands a separate treatment, which, as it is applicable to both questions in debate, must be reserved for the present.

Now the views of the United Presbyterian Church cannot be more definitely or more shortly stated than in their own language authoritatively—stated by themselves and before their union with the Free Church. "It is not competent," they say, "to the civil magistrate to give legislative sanction to any creed in the way of setting up a civil Establishment of religion, nor is it either his province to provide for the expense of the ministra-

tion of religion out of the national resources. It is Jesus Christ, as sole King and Head of His Church, who has enjoined upon His people, to provide for maintaining and extending it by free-will offerings; that this being the ordinance of Christ it excludes State aid for these purposes and that adherence to it is the true safeguard of the Church's independence."

In my view what follows does not at all qualify this passage, but in fairness it ought to be added: "Moreover, though uniformity of opinion with respect to civil Establishments of religion is not a term of communion in the United Presbyterian Church, yet the views on this subject held and universally acted upon are opposed to these institutions."

Here we have the two bodies which are supposed to establish identity of religious belief—the one asserting the right and duty to maintain and support an Establishment of religion, the other asserting that Christ's ordinance excludes State aid; each of them, therefore, treats the question as one of religious belief and obligation, and not one from which religious duties are excluded.

The second question in debate is the difference between the two bodies as to the two doctrines known as the Calvinistic and the Arminian doctrine of predestination. I use these two phrases, subject to more ample exposition hereafter, in order to summarize what I have to say, as preliminary to the discussion of the subject itself.

I regret very much that we have not any opinion from the learned judges whose judgment we are called upon to review; I am afraid, speaking for myself, I do not think it is competent to me to avoid dealing with it. It is included in the allegation of a departure from the doctrines which is complained of in the summons, and it has been argued before your Lordships with great learning and ability. One observation made by the learned counsel I entirely agree to, namely, that in discussing this subject one cannot ignore the contemporaneous theological discussions at the time the Confession of Faith was compiled.

Now the doctrine in dispute was the subject of a copious amount of literature all through the seventeenth century.

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Looking then at the history of the particular dispute which is brought into debate, it cannot be said that the language of the Confession of Faith was lightly drawn or arrived at without long debate and deliberation.

Indeed, it may be said of the Westminster Confession as a whole that it was composed with a deliberate and careful scrutiny which may be regarded as hardly equalled in any theological discussion; and though councils of the Church have lasted longer, yet if one regards the composition of the Assembly itself, the original parties to the discussion, the presentation of its different portions to Parliament, the adoption of it by Parliament, and afterwards by the Church of Scotland, these things give an overwhelming sanction to it, and at all events to its original meaning by those who were content to accept it as a test of the unity of their religious belief.

If this observation is true and applicable to the Confession of Faith as a whole (the minute report of its deliberations has been deciphered by the distinguished director and principal librarian of the British Museum), the particular doctrine debated as part of the code of belief which the Free Church adopted in 1843, and which it is alleged that the United Free Church has abandoned, can hardly be said to be one which any Christian Church could regard as a matter of indifference. It divided the Dutch Reformed Church at the beginning of the seventeenth century. It proved the subject of debate at the Hague in 1611 and at Delft in 1613.

An edict of the States of Holland sought to put an end to the controversy, but in vain; and, finally, in 1619, ten years after the death of Arminius, or Harmensen, as was his real name, the Arminian heresy, as it was described, was publicly condemned. Its professors were denounced as liars and deceivers, and those who participated in it were deprived of their civil rights unless they retracted.

James I. is said to have procured the exile of Conrad Vorstius, one of the protagonists of the Arminian doctrines, and afterwards he wrote a pamphlet against him, and argued that he ought to be put to death for his unchristian doctrines, while on the other hand the Councils of Constantinople in

1642 and the Council of Jerusalem in 1672 pronounced the following opinions:—

Treating of what they describe as the Calvinistic doctrine—

Councils of Constantinople, 1642, cap. 3 (1): "*τὸν Θεὸν ὑποτίθησιν ἀδικώτατον, τυραννικῇ χρώμενον ἐξουσίᾳ, μόνῃ λέγων τῇ θελήσει αὐτοῦ τοὺς μὲν εἰς δόξαν προορίσαι, τοὺς δὲ ἀποβάλλειν εἰς κόλασιν, μηδαμῶς τὰ ἔργα αὐτῶν σκοπούμενον. οὗ τί ἂν γένοιτο ἀσεβέστερον;*" (2) "Deum facit iniquissimum, tyrannica potestate utentem, aiens eum sola sua voluntate alios prædestinare ad gloriam, alios in pœnam mittere, nulla operum habita ratione. Quo quid magis impium proferri possit?"

The Synod of Jerusalem in 1672 said (extract from cap. 3): "*ἀλλὰ καὶ τὸ τὴν θείαν θέλησιν αἰτίαν εἶναι τῶν κατακρινομένων οὕτως ἁπλῶς καὶ ἀναιτίως ποίαν οὐκ ἔχει μανίαν; ποίαν οὐκ ἐπιφέρει κατὰ τοῦ Θεοῦ συκοφαντίαν, καὶ ποίαν εἰς τὸ ὕψος οὐ λαλεῖ ἀδικίαν, καὶ βλασφημίαν; ἀπείρατον μὲν γὰρ κακῶν τὸ Θεῖον, καὶ πάντων ἐξ ἴσου ἔθελον τὴν σωτηρίαν, ὡς μὴ ἐχουσης χώραν τῆς προσωποληψίας παρ' αὐτῷ οἴδαμεν. τοῖς βεβήλοις γενομένοις σκευέσι διὰ μοχθηρὰν αὐτῶν προαίρεσιν καὶ ἀμετανόητον καρδίαν ὡς δίκαιον παραχωρεῖν τὴν κατάκρισιν ὁμολογοῦμεν· κολάσεως δ' αἰωνίου, ὠμότητός τε καὶ 'ασπλαγχνίας, καὶ μισανθρωπίας αἴτιον, οὔποτε, οὔποτε φαμὲν τὸν Θεὸν, τὸν χαρὰν γίνεσθαι ἐν οὐρανῷ ἐπὶ ἑνὶ μετανοοῦντι ἁμαρτωλῷ ἀποφηνάμενον· μὴ γένοιτο ἡμᾶς οὕτως ἢ πιστεῦσαι, ἢ ἐννοῆσαι ἕως ἂν ἑαυτῶν ἐσμὲν. ἀναθέματι δὲ αἰωνίῳ καθυποβάλλομεν τοὺς τὰ τοιαῦτα καὶ λέγοντας, καὶ φρονοῦντας, καὶ χείρους πάντων ἀπίστων γινώσκομεν.*" (3) "Sed et

(1) Labbé (Philip) and Gabr. Cossartii (or under title of Coleti) Sacrosancta Concilia, Venice, 1728–1733, Vol. XXI., p. 1629.

(2) This may be translated as follows: "He represents God as being most unjust, using tyrannical power [despotism], when he says that He in obedience solely to His own will predestines some to glory and sends others to punishment, without taking any account at all of their works. Than which what could be more impious?"

(3) "But what madness it is to say that the Divine will should be the author of the condemnation of men thus absolutely and with grounds! What a calumny on God, and what an injury and blasphemy against His Majesty! For we know that God is incapable of producing evil, and that he desires the salvation of all alike, as there is with him no respecting of persons; of those that through their depraved nature and impenitent heart have made themselves vessels for dishonour we confess that it is just to allow damnation; but of eternal punishment, and cruelty and mercilessness and

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hominum ita simpliciter ac sine caussâ damnatorum auctorem statuere divinam voluntatem, insania quanta? quæ major Deo calumnia inferatur? Quanta in supremum Numen injuria, quanta blasphemia? Quippe intentatorem malorum non esse Deum, et omnium ex æquo salutem velle, ceu apud quem personarum acceptio nulla est, cognoscimus: et his qui pravis voluntatis suæ moribus ac secundum impœnitens cor se vasa in contumeliam effecere, damnationem juste decerni confitemur. Æternæ autem punitionis, immanitatis, duritiæ et inhumanitatis nusquam, nusquam dicimus auctorem esse Deum, super uno peccatore pœnitentiam agente esse in cælo gaudium, afferentem. Absit a nobis ita cogitare, nedum credere, quamdiu nostri compotes sumus: immo vero talia dicentes ac sentientes anathemati sempiterno subjicimus et cunctis infidelibus pejores agnoscimus."

I quote from the edition of the Councils of the Church published in Venice by two Jesuit Fathers in 1728, who have appended to the originals their own Latin translation.

It was in this state of the controversy agitating the Christian Church throughout the world that the Confession of Faith was adopted by the Church of Scotland on August 27, 1647, and the approval and adoption of it was made in a form which was intended to prevent cavil as to its being agreed upon without objection or doubt. It recites that the Confession was twice publicly read over, examined, and considered, that copies were printed that it might be sedulously perused by all members of the Assembly unto whom frequent intimation was publicly made to put in their objections and doubts, if they had any; and the said Confession being, upon due examination thereof, found by the Assembly to be most agreeable to the Word of God, and in nothing contrary to the received doctrines, worship, discipline, and government of this Kirk, it proceeds to adopt

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inhumanity, we never never call that God the author who has declared that there is joy in Heaven over one sinner that repenteth. God forbid that we should so believe, or even conceive, as long as we are in our right senses; and we devote to eternal anathema all those who say or think such things, and we hold them to be worse than any infidel."

it as a Confession of Faith for the three Kirks of God in the three kingdoms.

My Lords, I think it is only necessary to put in juxtaposition the language of the Confession of Faith itself and the statement of doctrine set forth by one component part of the supposed united body united in one faith and doctrine.

The Confession of Faith: "Chap. III. *Of God's Eternal Decree.* Sect. III. *By the decree of God*, for the manifestation of his glory some men and angels are predestinated unto everlasting life, *and others fore-ordained to everlasting death.* Sect. IV. These angels and men, thus predestinated and fore-ordained are *particularly and unchangeably designed; and their number is so certain and definite that it cannot be either increased or diminished.*"

Now then for the Act. Act (Declaratory Act) anent Confession of Faith made May 26, 1892 (1): "That this Church also holds that all who hear the Gospel are warranted and required to believe to the saving of their souls; and that in the case of such as do not believe, but perish in their sins, *the issue is due to their own rejection of the Gospel call. That this Church does not teach, and does not regard the Confession as teaching, the fore-ordination of men to death irrespective of their own sin.*"

It has been argued with great ingenuity, that inasmuch as the doctrine of predestination as treated of in the Scriptures is a mystery, and that various opinions have been held in respect of it, it cannot be made a test doctrine, since another doctrine may be held with it, not to human intelligence reconcilable with it, but equally derived from and established by scriptural authority. If the Scottish Church or the Westminster Confession as one of its declarations of doctrine had simply declared that predestination was one of its doctrines, there might be something in the argument, but the argument ignores the fact that the Westminster Confession purports to explain, and does explain, in language which does not admit of doubt, what is meant. Each party well knew what they meant. It is not a question of metaphysical subtleties or ambiguous

(1) Ante, p. 543.

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language. Each meant to exclude and denounce the doctrine of the other.

I am, therefore, led to the conclusion that upon this second question the appellants are entitled to succeed.

But, my Lords, another question is raised which in one sense as affecting the law of trusts and their administration is most important.

The Dean of Faculty boldly argued for the inherent power of every Christian Church to change its doctrines, and Lord Young has based his judgment upon this proposition.

My Lords, apart from some mysterious and subtle meaning to be attached to the word "Church," and understanding it to mean an associated body of Christian believers, I do not suppose that anybody will dispute the right of any man, or any collection of men, to change their religious beliefs according to their own consciences; but when men subscribe money for a particular object and leave it behind them for the promotion of that object, their successors have no right to change the object endowed.

In this case it is suggested that the terms of what is called the Barrier Act suggest such licence to change.

I am not able to concur in such an inference.

It is obvious that dealing with such a subject as formularies books of religious instruction, and the like, many things might be done, written and taught which might touch doctrine, and for the purpose of preventing any alteration in doctrine the precautions insisted upon by the Barrier Act were thought necessary to prevent and render impossible any departure from the orthodox standards. It provides that "before any General Assembly of the Church shall pass any Acts which are to be binding rules and constitutions to the Church" (observe "binding rules and constitutions") "the same Acts be first proposed as overtures to the Assembly."

Many things might be proposed which as "binding rules and constitutions" might touch doctrine, or worship, or discipline, or government; but that the Church of Scotland in 1697 might change its faith or permit it to be changed is a suggestion which to one acquainted with its history either then

or even a very long time after is not very plausible. It is only just to Lord Young to say that he adds: "I desire to say that there is, in my opinion, no rule of law to prevent a *dissenting Church from abandoning a religious doctrine or principle, however essential and fundamental or from returning to it again with or without qualification or modification* Whether or not a property title is such that a forfeiture of property will follow such abandonment or return is another matter."

But that is the whole question now before your Lordships, and as it appears to me there is nothing in calling an associated body a Church that exempts it from the legal obligations of insisting that money given for one purpose shall not be devoted to another. Any other view it appears to me would be fatal to the existence of every Nonconformist body throughout the country.

But there is another and a further ground upon which I think the appellants are entitled to succeed, and that is that the so-called union is not really an union of religious belief at all. The united body has united in its organizations. It has established its various administrative arrangements, has declared its authority as the United Free Church, and in that name has absorbed the various bodies of the United Presbyterians and the Free Church as originally constituted; but has it agreed in the doctrines or either of them, and if so, which is it that has given way?

My Lords, I am bound to say that after the most careful examination of the various documents submitted to us, I cannot trace the least evidence of either of them having abandoned their original views. It is not the case of two associated bodies of Christians in complete harmony as to their doctrine agreeing to share their funds, but two bodies each agreeing to keep their separate religious views where they differ—agreeing to make their formularies so elastic as to admit those who accept them according as their respective consciences will permit.

Assuming, as I do, that there are differences of belief between them, these differences are not got rid of by their agreeing to say nothing about them, nor are these essentially diverse views

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avoided by selecting so elastic a formulary as can be accepted by people who differ and say that they claim their liberty to retain their differences while purporting to join in one Christian Church.

It becomes but a colourable union, and no trust fund devoted to one form of faith can be shared by another communion simply because they say in effect there are some parts of this or that confession which we will agree not to discuss, and we will make our formularies such that either of us can accept it.

Such an agreement would not, in my view, constitute a Church at all, or it would be, to use Sir William Smith's phrase, a Church without a religion. Its formularies would be designed not to be a confession of faith, but a concealment of such part of the faith as constituted an impediment to the union.

I am disposed to quote one passage from what was said by Dr. William Willson from the Moderator's Chair in 1866, and which I find in Mr. A. Taylor Innes' most excellent Treatise on the Law of Creeds in Scotland (1). Speaking of the freedom of the Church as to confessions of faith, he says: "We are not at liberty to hold forth a confession in which we do not believe. For in such a case the Church is absolutely without a confession . . . . It ceases to be either a bond of union or a public testimony. It is lawful for the Church to revise her confession and adjust it to her present attainments and exigencies; it is lawful for her altogether to dispense with a confession, if, indeed, without one any organization were possible, but to retain a confession which has ceased to be believed can never be lawful."

He is speaking, of course, of the Christian conscience, and, as he says at an earlier period of his discourse, when the Church has arrived at the conclusion that its confession must be altered, "the time has come for us then to frame a new bond of union with each other, a new testimony to the world."

This would certainly not be done by making formularies ambiguous or elastic, or authorizing its votaries to put different

(1) 1902 ed. p. 245, n.

meanings upon a set of words the function of which was intended to be a test of the unity of their faith.

That this is the principle upon which the so-called union has been arrived at is proved by the declaration of the United Church, in which they claim in effect to retain their own separate views held either in the United Presbyterian or in the Free Church, or in either of the bodies which originally composed the united body which afterwards became the United Presbyterian Church. They say this: "1. The various matters of agreement between the Churches with a view to union are accepted and enacted without prejudice to the inherent liberty of the United Church, as a Church of Christ, to determine and regulate its own constitution and laws as duty may require, in dependence on the grace of God and under the guidance of His Word. 3. As this union takes place on the footing of maintaining the liberty of judgment and action heretofore recognised in either of the Churches uniting, so, in particular, it is hereby declared that members of both Churches, and also of all Churches which in time past have united with either of them, shall have full right as they see cause to assert and maintain the views of truth and duty which they had liberty to maintain in the said Churches."

For these reasons, I think the judgment ought to be reversed, and I so move your Lordships; but I cannot conclude without expressing how much we are indebted to the learned counsel on both sides for their most able and learned argument.

[It was admitted that the other appeal must follow the decision in this.]

LORD MACNAGHTEN. My Lords, I am unable to agree in the conclusion at which your Lordships have arrived. I do not differ from any of your Lordships as to the law—at least, I think not. I accept the principles laid down in this House in *Craigdallie* v. *Aikman* (1) and the other cases referred to during the argument. I accept those principles loyally and entirely, however much I may err in their application.

(1) 1 Dow, 1, 16; 2 Bli. 529; 21 R. R. 107.

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My Lords, every one, I think, must feel that the consequences of your Lordships' decision to-day for good or evil will be far-reaching and of momentous importance—graver, I think, and more serious than the consequences of any decision in which it has been my lot to take part. And the argument addressed to your Lordships has been worthy of the occasion. But after all the question at issue is one of a very ordinary description. It is alleged on the one hand and denied on the other that there has been a breach of trust in the disposition of property. The complaint is that funds contributed and set apart for one purpose have been diverted to another and a different purpose. Such questions are of everyday occurrence, and the problem in each case must be solved by the ordinary commonplace inquiry, What was the purpose for which the funds in dispute were collected? What was the original trust?

My Lords, the funds in question in the present case represent moneys contributed for the support of the Free Church of Scotland. They represent property dedicated to the use of the Church body or voluntary association of professing Christians founded by those ministers of the Established Church of Scotland who in 1843, on the memorable occasion known as the Disruption, withdrew from the Establishment; or according to their own view of the transaction separated from the State, carrying with them the greater part of the office-bearers of the Established Church and at least one-half of her members in full communion, asserting all the while for themselves and their followers in time to come the character of the ancient and true Church of Scotland. Setting forth with these lofty pretensions they declared their adherence to the principles and practice of the Church of Scotland as regards doctrine, worship, discipline, and government untrammelled and unfettered by connection with the State and purged of every taint of Erastianism.

The question, therefore, seems to me to be this. Was the Church thus purified—the Free Church—so bound and tied by the tenets of the Church of Scotland prevailing at the time of disruption that departure from those tenets in any matter of substance would be a violation of that profession or testimony

which may be called the unwritten charter of her foundation, and so necessarily involve a breach of trust in the administration of funds contributed for no other purpose but the support of the Free Church—the Church of the Disruption? Was the Free Church by the very condition of her existence forced to cling to her subordinate standards with so desperate a grip that she has lost hold and touch of the supreme standard of her faith? Was she from birth incapable of all growth and development? Was she (in a word) a dead branch and not a living Church?

This, I think, is the real and only question. But if I may venture to say so without offence, it has been rather pushed aside and obscured by a very interesting preliminary search after a principle, if it be a principle, called for the sake of convenience, and not, I think, for the sake of clearness, "the Establishment principle," which in my humble judgment partakes rather of the elusive attraction of an ignis fatuus—which means much or little, just as you may choose to interpret one of the most obscure passages in the Westminster Confession—which in one aspect no Christian man I think would hesitate to accept, but which in the mouth of an adherent of a Church that has abandoned Establishment and separated from the State can only mean a counsel of perfection unattainable in this world, at least until the advent of the millennium.

Your Lordships have been furnished with a print of many Scottish statutes and a bulky volume containing the Acts of the General Assembly of the Church of Scotland. I have read those documents and many others to which the attention of the House was directed with much interest and some care. I can only say that they have confirmed me in the opinion I entertained at the conclusion of the first argument—no doubt erroneously—that the judgment under appeal was right and ought to be affirmed.

I do not propose to trouble your Lordships by tracing the history of the Church of Scotland in its connection with the State from the date of the first Reformation to the time of the Disruption. That was done very ably and very fully by the learned counsel at the bar. It is enough for me to say that during the whole period of the existence of the Church of

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Scotland there was a constant assertion of spiritual independence—of the right, as it was termed, of the Lord Jesus to reign in His own House. I will only give one instance—I might give many—and I will give an instance that occurred almost on the eve of Disruption. On May 23, 1838, the General Assembly of the Church of Scotland passed this resolution, which is called "Resolution anent the Independent Jurisdiction of the Church of Scotland." "The General Assembly, having heard and considered the overtures on the independent jurisdiction of the Church of Scotland, agreed, by a majority, to the following resolution: That the General Assembly of the Church of Scotland, while they unqualifiedly acknowledge the exclusive jurisdiction of the Civil Courts in regard to the civil rights and emoluments secured by law to the Church, and ministers thereof, and will ever give and inculcate implicit obedience to their decisions there anent, do resolve, that, as is declared in the Confession of Faith of this National Established Church, 'the Lord Jesus, as King and head of His Church, hath therein appointed a government in the hand of church officers, distinct from the civil magistrate'; and that in all matters touching the doctrine, government, and discipline of this Church, her judicatories possess an exclusive jurisdiction, founded on the Word of God, 'which power ecclesiastical' (in the words of the Second Book of Discipline) 'flows immediately from God and the mediator Jesus Christ, and is spiritual, not having a temporal head on earth, but only Christ, the only spiritual King and Governor of his kirk'; and they do farther resolve that this spiritual jurisdiction, and the supremacy and sole headship of the Lord Jesus Christ, on which it depends, they will assert and at all hazards defend, by the help and blessing of that great God, who, in the days of old, enabled their fathers, amid manifold persecutions, to maintain a testimony, even to the death, for Christ's kingdom and crown; and, finally, that they will firmly enforce submission to the same upon the office bearers and members of this Church, by the execution of her laws, in the exercise of the ecclesiastical authority wherewith they are invested."

Thus, while the Church was in connection with the State,

she took upon herself to declare emphatically that what she claimed was nothing less than an exclusive jurisdiction founded on the Word of God in all matters touching the doctrine as well as the government and discipline of the Church. The fact that this resolution was passed by a majority shews that it was carried by the vote of the party which five years later went out as the Free Church. Some may have hesitated—some dissented. The majority — the Free Church in embryo— recognised this claim of "Church Power" as the governing principle of the Church.

My Lords, during the period when the Church which had passed through the furnace of two reformations was approaching her last and greatest trial there grew up in the Church two parties—the Moderates and the Evangelicals. It was to the Evangelicals in later days that the Free Church of Scotland owed her separate existence. For a long time the Evangelical party was in a minority, and matters then went tolerably smoothly between Church and State. Ultimately in 1834 the Evangelicals gained the ascendency. They were the party of progress, reform, and church extension. They planted religion in remote and half-civilized districts in the Highlands of Scotland. They founded missions in all parts of the world. Their zeal and fervour were, as their adherents boasted, in striking contrast to the apathy and lukewarmness of the Moderates. When they became the dominant party they carried matters with a high hand. They passed Acts, the Veto Act, and the Chapel Act, which were altogether beyond the competence of the Church as established by law. They censured and deposed ministers who obeyed the decrees of the Court of Session. They held those decrees to be encroachments on the true liberties of the Church, and actually pronounced them illegal. The State refused to admit their claims. The strong arm of the law restrained their extravagances. They still maintained that their proceedings were justified, and required by the doctrine of the Headship of Christ, which was common to all the Reformed Churches, but to which they attached peculiar and extraordinary significance. Then came the protest of 1842— "the unanswered and unanswerable protest," as they called it.

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It was followed by a cold and chilling reply from the Government in power; and it became evident to all thinking men that as the State would not give way the leaders of the Assembly and those who adhered to them would have to retract their pretensions and own themselves defeated or quit the Establishment altogether. No one who knew the courage and temper of the leaders of the Assembly, no one who had caught the note of defiance and triumph sounded by Dr. Chalmers at the close of the Edinburgh Convocation, could doubt what the issue would be.

And now, in passing, I would call your Lordships' attention to one fact which seems to me not unworthy of notice, when Dr. Chalmers' address, preached before the first Free Church Assembly, is relied upon as a sort of prospectus on the faith of which the funds of the Free Church were collected, as if the Free Church were a joint stock concern, and that sermon an invitation to the public to put their money in it. My Lords, months before the Disruption actually took place, when all Scotland was looking forward with feverish anxiety to the last act of the drama, the leaders of the Evangelical party, with Dr. Chalmers at their head—a great divine and an eloquent preacher, who had a wonderful faculty of organization and something of the genius of a statesman—set about collecting funds for the needs of the Church. "Before the meeting of the General Assembly" (I am now quoting from a book which I believe is of recognised authority), "the members of the popular party had arranged their course of proceeding. Associations were formed throughout the whole of Scotland, and subscriptions were collected for the purpose of building churches and providing a maintenance for the ministers who were soon to lose the benefits of the national endowments. Dr. Chalmers presided over the general finance committee and acted with an energy and success which amazed even those who had best known his labours for a similar purpose in the cause of the Establishment. The thousands of circulars which he dispersed bore the following mottoes: 'Surely I will not come into the tabernacle of my house, nor go up into my bed; I will not give sleep to my eyes, nor slumber to mine eyelids,

until I find a place for the Lord, an habitation for the mighty God of Jacob!' 'The God of Heaven He will prosper us; therefore we His servants will arise and build!'" (1)

My Lords, that was the origin of the fund. Those were the winged messengers that prepared the ground and sowed the good seed. And when the Disruption took place, and appeals were made in every parish, in every nook and corner of Scotland, calling upon the people to stand by the Church of their forefathers, denouncing the tyranny of the State, describing in harrowing terms the sufferings of ministers, old and young, driven from their homes with their wives and children, forced to seek shelter in sheds and hovels while they faithfully ministered to their flocks, and some actually dying of want and exposure, money came in abundantly in answer to the call. Dr. Chalmers' address to the first Free Church Assembly was but one of a thousand—I might say, of a million—similar discourses. It was eloquent, of course. It was stirring. But I rather take leave to doubt whether the warning that I find there, against Voluntaryism and against Anarchy, an evil, as the preacher truly says, more to be dreaded than Voluntaryism, was very stirring or likely of itself to evoke a generous response. The negation of dangerous principles does not as a rule rouse enthusiasm. Of what is called the Establishment principle as a tenet or opinion of the Free Church I shall have a word to say presently. All I want to impress upon your Lordships at this moment is that when that sermon was preached by Dr. Chalmers, on an occasion more eloquent and more stirring than any appeal in words could be, the fund was already in full swing.

Then for whom and with what purpose was the money collected? Except as regards sums devoted to special purposes and special objects, the fund was all one fund. It was collected for the needs of the Free Church of Scotland. And what was the Free Church? Did it go out as a Sect or a Persuasion or a Connection, with peculiar tenets cut and dried and defined in the precise language of a conveyancer? Nothing of the kind. Those who went out went forth declaring that they were not a

(1) Ecclesiastical History of Scotland, by George Grub, vol. iv. p. 226.

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sect, but the National Church—that they were still the Church of Scotland. "We are," they said (to quote the words of Dr. Candlish, one who was only second—if he was second—to Dr. Chalmers himself)—"we are still the Church of Scotland—the only Church that deserves the name, the only Church that can be known and recognised by the maintaining of those principles to which the Church of our fathers was true, when she was on the mountain and on the field, when she was under persecution, when she was an outcast from the world. And, believing that we are not seceders from the Church, but are the Church separated from the State—believing that we are not a sect separated from the Established Church, but that we are the Church of Scotland separating from the State, we hold ourselves entitled without any disparagement to other religious bodies to assume and act upon the principle that we are to maintain the character of the National Church of Scotland." (1) An impossible position, it may be said, in point of law! They went out, not as a Church, but as individuals separating from the Church, and they united again in a voluntary body of professing Christians! That may be so. But to themselves and to their adherents, and I may add to other religious bodies which were not of their communion, they supported the character of the National Church of Scotland. And supporting that character, rightly or wrongly assumed, they must be taken, I think, in regard to their own body, to have all the powers of a National Church.

Speaking for myself, I cannot form a conception of a National Church untrammelled and unfettered by connection with the State which does not at least possess the power of revising and amending the formulæ of subscription required of its own office-bearers, and the power of pronouncing authoritatively that some latitude of opinion is permissible to its members in regard to matters which, according to the common apprehension of mankind, are not matters of faith. I agree that a sect may erect any point or any punctilio however trifling and absurd into an article of faith. My position is, that the adherents of the Free Church were not a sect, and

(1) Memorials of Robert Smith Candlish, D.D., p. 310.

that they never made the Establishment principle an article of faith.

But, my Lords, I go further. This Establishment principle, whatever it is, can have no higher authority than the article of the Westminster Confession in which it is supposed to be embedded. If the Church has power to amend her Confession she can, of course, take occasion to declare that the Establishment principle is to be regarded as an open question, in reference to which every man is at liberty to exercise his private judgment. Now, it seems to me clear that the Free Church when it came into existence claimed the power of altering and amending her Confession of Faith. On the second argument the Dean of Faculty called your Lordships' attention to a little book entitled "Catechism on the Principles and Constitution of the Free Church of Scotland issued by authority of the General Assembly." The preparation of this work was taken in hand in 1843. It was issued in December, 1845, by authority of the Publication Committee. It sets forth in the forefront of an appendix the Resolution of 1838, which I have already quoted. In 1847 the General Assembly approved generally of this catechism "as containing a valuable Summary of this Church's history and Exhibition of her distinctive principles from the beginning of the Reformation to the present time." And the Assembly earnestly recommended its general use. So that it has an unquestionable claim to be considered a contemporaneous document exhibiting the distinctive principles of the Free Church. Mr. Taylor Innes, in his valuable work on the Law of Creeds in Scotland (1), quotes from it as a book of authority, but speaks of it as an intensely polemical volume. So it is. From beginning to end it attacks and flouts and belittles the Established Church; but the very bitterness of its tone shews that it was composed in the earliest days of Disruption. I will not weary your Lordships by quoting from it at any length, but I may remind your Lordships that it points out that the Church of Scotland, as a Church on its own authority, adopted the Westminster Confession, at the very time when Knox's Confession had the sanction of the State. (2)

(1) 1902 ed. pp. 86, 244.

(2) Q. 234: see Appx. N, p. 760.

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The catechism deals at some length with "Church Power." It explains that this power is the power of the Keys. It declares that it is divided into four parts, and that the first part is "the Dogmatic power in virtue of which the Doctrine and Laws of the Word are declared and religious controversies are determined." (1) It asks, "When is the Dogmatic power abused?" The answer is, "When it is made the pretext for a claim of infallibility and employed to subvert the right of private judgment, and when that implicit submission which is due only to the Word is demanded for Church formularies and decrees." (2) In an earlier passage, in a note to Q. 44 quoted by Mr. Taylor Innes, there is a sly hit at the Established Church, and a sharp contrast drawn between the view of the Evangelical party and the view of the Moderates, not altogether to the advantage of the latter. "It is one thing," say the authors of the catechism, "for the civil privileges and endowments of a Church to be tied to a confession by civil enactments" (that was the comparative freedom of the Evangelicals), "and quite another thing for a Church itself to be so" (that was the bondage of the Moderates and their Established Church). "In the former case the Church when she finds that any articles of her Confession are unscriptural is at liberty to renounce them, being only bound if she do to resign her temporalities. In the latter case the law allows no relief whatever for the Church in her corporate capacity when she discovers errors in her Confession, which, of course, is as much as to say that the Church is bound always to go absolutely upon the supposition of its soundness, and to interpret the Word of God agreeably to its declarations. Under these circumstances the supreme and ultimate standard of doctrine is, not the Bible, but the Confession of Faith."

My Lords, I greatly fear that that is the position into which the Free Church will be driven if Mr. Johnston's argument prevails.

I could easily multiply quotations from this Free Church catechism; but I think I have quoted enough to prove that to the fathers of the Free Church movement the notion of

(1) Q. 135. (2) Q. 139.

altering the Westminster Confession of Faith was not so very shocking.

I do not rely on the Barrier Act. If I may say so, it seems to me that that was rather a false point. The Barrier Act may possibly imply—it certainly does not assert—Church Power as understood by the Evangelical party and the Free Church of Scotland. The Resolution of 1838 belongs to a different class of legislation. It is a declaratory Act. It speaks in the plainest and clearest language. The Free Church Catechism shews that at the time of the Disruption it was understood to mean precisely what it says and to assert the exclusive power of the Church founded on the word of God over doctrine—that is, over her creeds, her confessions, her formularies, and her decrees. So the Act of 1838 declares. So the Free Church Catechism of 1845 teaches. The Act of 1838 therefore supplies what was wanting in *Craigdallie* v. *Aikman* (1) and the very thing which in Lord Eldon's view would have sufficed to turn the scale. Without ignoring both the Act of 1838 and the Free Church Catechism of 1845 it seems to me impossible to deny that provision for expansion and development—for that growth without which there can be no life—was part and parcel of the original trust under which the funds in question in the present case have been collected and set apart.

My Lords, if the view which I have roughly indicated is correct, I think it is enough to dispose of this case in both its branches. But there are two points on which a great deal of argument was bestowed, and on which I should like to say a few words. There is the Establishment principle as it is called, and there are those higher mysteries which were dealt with boldly but reverently by the learned counsel who spoke second for the United Free Church. (2)

My Lords, as regards the Establishment principle, I know that that very distinguished man to whom I have already referred and who, after Dr. Chalmers, was the leader of the Free Church, doubted to the last whether the principle of a

(1) 1 Dow, 1, 16.

(2) Haldane, K.C.

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National Establishment of religion was a principle at all. (1) He maintained that throughout the whole of the Church's history there was no event—that was the word he used—that proclaimed formally and directly that the principle of a National Establishment of religion was a vital principle which the Church was bound to maintain. Speaking for myself, I do not altogether take that view, though I agree with him in thinking that the Establishment principle sinks into absolute insignificance compared with the great principle of the independence and power of the Church and "the exclusive authority of Christ in His own house." I think it must be admitted that the Establishment principle, as it may be gathered from the somewhat obscure language of the Westminster Confession, was the generally received opinion in the Church. It was necessarily the received though unexpressed opinion of the Church before the Disruption. When the Disruption took place circumstances were altered, and then I think there was a diversity of opinion on the subject.

Lord Trayner says that it appears to him "difficult to hold that a mere opinion as to what some third person was bound to do, which he might neglect or refuse to do, and which the Church would not compel him to do, could in any way be an essential part of the constitution of the Church which held that opinion." Well, that was exactly Dr. Candlish's opinion at the very time of the Disruption. I refer to his opinion, not as the opinion of a person authorized to speak on behalf of the Church, but as the opinion of a very leading man, whom many others would probably follow.

At the General Assembly, held in Glasgow in the autumn of the year of Disruption, Dr. Candlish, speaking about the Establishment principle and pointing out that the refusal of the State to establish the Church on the only terms to which the Church could consent left them a great degree of liberty as to the terms on which they should stand with other Churches, puts the case thus: "Is the division and schism of the Christian Church to be kept up by a question as to the

(1) Memorials of R. S. Candlish, p. 554.

duty of another party over whom we have no control? Let it be that we maintain our different opinions as to the duty of the State to support the Church, and the duty of the Church to receive support from the State when it is given consistently with spiritual freedom, still shall that question, which has become a mere theoretical question in the Church of Christ, and which so far as we can judge seems destined to be a mere theoretical question till the time when the kingdoms of this world shall become the kingdoms of our Lord and of His Christ—shall that question prevent cordial co-operation and harmony among ourselves, and our united action in defence of our common Protestantism against the common foe?" (1)

My Lords, I have no doubt that the opinions which Dr. Candlish expressed so eloquently at the time of the Disruption must have been held by many adherents of the Free Church. And as time went on and the splendid voluntaryism of the Free Church on a basis and a scale never before understood or attempted placed the Free Church on a level with the Established Church at home, and in a position certainly not inferior as regards missionary labours abroad, the natural tendency, I think, even among those who were disposed to regard the Establishment principle as a sacred principle (if any such there were), must have been in the direction of the conclusion that the Church of Scotland could exist not only without an Establishment, but even without the profession of the Establishment principle.

My Lords, speaking for myself, and with the utmost deference to the great majority from whom I have the misfortune to differ, I think this question about the Establishment principle is a very small question indeed, and that it occupied a great deal too much of the argument to the exclusion of far weightier matters.

My Lords, I cannot call the matters that were discussed by Mr. Haldane small or insignificant. They are mysteries into which I do not think it is our province to intrude. And, indeed, I am not quite sure that at the conclusion of Mr. Haldane's argument I had gained a clearer insight into these hidden

(1) Memorials of R. S. Candlish, pp. 317, 318.

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things than I had before. At any rate, I am happy to think that it is not necessary to enter into such questions at all. If the Church has power to relax the stringency of the formulæ required from her ministers and office-bearers, so as to avoid offence to the consciences of the most conscientious and to keep within her fold the most able and enlightened of her probationers, that is all that is required. That she has that power I cannot doubt. These formulæ were imposed by Parliament. If they owed their force and efficacy in the Established Church to Acts of Parliament, the Free Church has rejected the ordinances of men and the authority of Parliament, and is free to regulate her own formulæ. If in the Established Church they owed their force wholly or in part to the antecedent recognition of the Church, the Free Church, as it seems to me, claiming to act and recognised by her adherents as acting in the character of a National Church and proceeding regularly in accordance with her constitution, may do now what the Church did in the seventeenth century.

My Lords, owing to the vast importance of this case and the very able and learned arguments of counsel at the bar, I have thought it right to state in my own language the reasons which have led me to the opinion I hold. Under ordinary circumstances I should have been content to express my concurrence in the opinions delivered by the learned judges in Scotland, and specially in the opinions of the Lord Ordinary and Lord Trayner.

It is impossible, in my opinion, to overrate the importance of the issue awaiting decision. I do not agree with the learned counsel for the appellants that the United Free Church is a changeling—a creature of a composite nature with a double face and two voices. I think the Free Church has preserved her identity. I think she is entitled to as much respect, I had almost said as much veneration, as when she went forth, casting off for conscience sake the fetters and the advantages of State connection. I do not think she has forfeited any of her rights by receiving into her bosom a Reformed and Presbyterian Church, one with her in faith, in baptism, and all essential points of doctrine. And for my part I should hesitate

long before I could give my voice for a decision which will I fear compel, or at any rate direct, her to subordinate the Scriptures to the Westminster Confession of Faith.

LORD DAVEY. My Lords, the subject-matter of the action out of which this appeal has arisen is certain heritable and movable property of great value, which is held by trustees, who are the first respondents, in trust for the Free Church of Scotland. That Church is a voluntary and unincorporated association of Christians united on the basis of agreement in certain religious tenets and principles of worship, discipline, and Church government. The pursuers and present appellants were in the year 1900, and claim to be still, members of the Free Church, and their complaint, so far as it is cognisable by a civil Court, is that their trustees, at the bidding of other members of the Free Church, but in breach of their trust, have applied, and threaten and intend to apply, the trust property to purposes which are alien to the purposes of the trust, and for the benefit of persons who have no title to call themselves members of the Church. In fact, the appellants say that they alone hold in their integrity the tenets and principles of the association for whose benefit the trust was founded.

The law on this subject is free from doubt. It has been settled by numerous decisions of the Courts both in Scotland and in England, and has been affirmed by judgments of this House. The case of *Craigdallie* v. *Aikman* (1) came twice before this House. In the second appeal Lord Eldon thus stated the principle on which the House proceeded: "When this matter was formerly before the House we acted upon this principle, that if we could find out what were the religious principles of those who originally attended the chapel we should hold the building appropriated to the use of persons who adhere to the same religious principles." And after stating the result of the inquiries directed by the former judgment Lord Eldon said: "Supposing that there is a division of religious opinions in the persons at present wishing to enjoy this building, the question then would be which of them

(1) 1 Dow, 1, 16; 2 Bli. 529, at pp. 539, 541.

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adhered to the opinions of those who had built the place of worship, and which of them differed from those opinions? Those who still adhered to those religious principles being more properly to be considered as the cestuis que trust of those who held this place of worship in trust, than those who have departed altogether from the religious principles of those who founded this place, if I may so express it."

In an English case (*Attorney-General* v. *Pearson* (1)), decided in 1817, and therefore between the two appeals in the *Craigdallie Case* (2), Lord Eldon, referring to that case, expounded the principle acted on by the House more at large. "But if," he said, "on the other hand, it turns out (and I think that this point was settled in a case which lately came before the House of Lords by way of appeal out of Scotland) that the institution was established for the express purpose of such form of religious worship, or the teaching of such particular doctrines as the founder has thought most conformable to the principles of the Christian religion, I do not apprehend that it is in the power of individuals having the management of that institution at any time to alter the purpose for which it was founded, or to say to the remaining members, 'We have changed our opinions—and you, who assemble in this place for the purpose of hearing the doctrines, and joining in the worship prescribed by the founder, shall no longer enjoy the benefit he intended for you, unless you conform to the alteration which has taken place in our opinions.' In such a case, therefore, I apprehend—considering it as settled by the authority of that I have already referred to—that where a congregation become dissentient among themselves, the nature of the original institution must alone be looked to as the guide for the decision of the Court, and that to refer to any other criterion, as to the sense of the existing majority, would be to make a new institution, which is altogether beyond the reach, and inconsistent with the duties and character, of this Court."

My Lords, I disclaim altogether any right in this or any other Civil Court of this realm to discuss the truth or reasonableness

(1) 3 Mer. 353, at p. 400; 17 R. R. 100, 101.

(2) 1 Dow, 1, 16; 2 Bli. 529; 21 R. R. 107.

of any of the doctrines of this or any other religious association, or to say whether any of them are or are not based on a just interpretation of the language of Scripture, or whether the contradictions or antinomies between different statements of doctrine are or are not real or apparent only, or whether such contradictions do or do not proceed only from an imperfect and finite conception of a perfect and infinite Being, or any similar question. The more humble, but not useless, function of the civil Court is to determine whether the trusts imposed upon property by the founders of the trust are being duly observed. I appreciate, and if I may properly say so, I sympathise with the effort made by men of great intelligence and sound learning to escape from the fetters forged by an earlier generation. But sitting on appeal from a Court of law, I am not at liberty to take any such matter into consideration.

The question in each case is, What were the religious tenets and principles which formed the bond of union of the association for whose benefit the trust was created? I do not think that the Court has any test or touchstone by which it can pronounce that any tenet forming part of the body of doctrine professed by the association is not vital, essential, or fundamental, unless the parties have themselves declared it not to be so. The bond of union, however, may contain within itself a power in some recognised body to control, alter, or modify the tenets and principles at one time professed by the association. But the existence of such a power would have to be proved like any other tenet or principle of the association.

My Lords, I do not propose to travel through the numerous documents which state the grounds of the great disruption in 1843, and the principles held and professed by the founders of the Free Church. The result, in my opinion, is that the Free Church took with it the doctrine, government, and discipline of the Established Church, freed from the fetters and conditions imposed on that Church by its connection with the State. The Free Church adopted as its standards the Westminster Confession and the other subordinate standards of the Established Church. It also adopted the provisions of the Barrier Act, and any other provisions affecting the constitution of the Church or

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the powers of its General Assembly. In fact, the founders of the Free Church claimed that "in doctrine, polity, and discipline they truly represented the Church of their fathers," and that "it is her being free and not her being established that constitutes the real historical and hereditary identity of the Reformed National Church of Scotland."

There is, however, one document which should be more particularly referred to, namely, the protest put forth as their first act by the members of the General Assembly of the Established Church who withdrew from that Assembly on the historical May 18, 1843. This protest was ordered to be recorded by the several presbyteries of the Free Church at the beginning of their presbytery books as the ground and warrant of their proceedings, and it may fitly be called the Charter of the Free Church. It is at once an apologia and an affirmance of the distinctive position taken up by the founders of the Church. In vindicating in vigorous terms their right and duty to separate from the Establishment—maintaining the Confession of Faith and other standards of the Church of Scotland as theretofore understood—they are careful to firmly assert the right and duty of the civil magistrate to maintain and support an establishment of religion in accordance with God's Word.

It is a matter in dispute whether it was a tenet of the Established Church that it is the duty of the State to establish and endow a National Church. It has been said by learned judges in the Court of Session (see Lord Meadowbank in *Smith* v. *Galbraith* (1)) that it was not required that the principle of a religious establishment in connection with and endowed by the State should be professed as an article of faith. It was pointed out that the article on the civil magistrate admits of other constructions, and that a civil ruler may perform the duty ascribed to him in that article in other ways than by establishment and endowment. But, however this may be, I think it is plain from their public utterances that the founders of the Free Church considered that the Establishment principle was part of the body of doctrine which they brought with them from the Established Church, and that they held and stated it

(1) (1843) 5 D. 665, 685.

in the clearest terms. It is impossible, in my opinion, to get rid of the explicit statement of the doctrine in the protest of May 18, 1843, by calling it "parenthetical," or a matter of opinion. The affirmance of the doctrine may be said to derive strength from the form of the sentence. For it shews that the authors of the protest regarded it as of so much importance that they go out of their way to state it, and thus define more clearly their position, and avoid the imputation that by separating from the Established Church they had become "Voluntaries." Again, in the Act of 1846, "anent questions and formula," while disclaiming intolerant or persecuting principles, "the Church firmly maintains the same Scriptural principles as to the duties of nations and their rulers in reference to true religion and the Church of Christ for which she has hitherto contended." And (not to multiply evidence of what is not really disputed) in the address of Dr. Chalmers, which was incorporated in a manifesto issued by direction of the General Assembly of May, 1843, and entitled "The Affectionate Representation of the Free Church of Scotland," that eminent person expressed himself in language which I will not repeat, as it has been read by my noble and learned friend on the Woolsack.

My Lords, I cannot bring myself to doubt that a doctrine thus "firmly" asserted and maintained, and officially put forward, was a distinctive tenet of the Free Church of Scotland, and formed a link in the bond of union between the members of that association. The Lord Ordinary and the learned judges in the Inner House treated it as neither fundamental nor essential, and they seem to have regarded it as a pious opinion, held, indeed, by the founders of the Church, but destitute in the circumstances of any practical importance. I have already said that I have no means of testing the fundamental or essential character of the doctrine apart from the utterances of the parties themselves. They certainly were as far as possible from treating it as an open question, and that attitude was maintained for many years after the foundation of the Church. The doctrine of the independence of the Church under the headship of Christ

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alone was the very foundation of their position, and was necessarily put forward by them as fundamental; but that is no proof that they did not regard other tenets also as essential or distinctive articles of belief.

The questions, therefore, in my opinion come to be whether it was a term in the compact or bond of union that the General Assembly should have power to alter or vary the doctrines of the Church, and what are the limits (if any) of such a power. I was impressed (as I believe all your Lordships were) by the powerful argument of the Dean of Faculty. If I understood the learned Dean correctly, he maintained that the General Assembly of the Church of Scotland had by its constitution an inherent power of plenary legislation over all matters ecclesiastical, including doctrine, subject only to the conditions imposed by the Act of Assembly called the Barrier Act. And he carried his argument so far as to maintain that the General Assembly of the Free Church, exercising the inherent powers of the Established Church, but freed from the fetters imposed by Acts of Parliament, might derogate from or even reject the Confession of Faith itself.

My Lords, the freedom of the Church from the control of the civil power in spiritualibus, which is asserted by the Free Church, does not appear to me to warrant any à priori inference of the existence of such a plenary power of legislation in the General Assembly. It is, indeed, almost a truism that an unestablished religious association is free from State control as regards doctrine, government, and discipline. But that freedom which differentiates a voluntary association from an Established Church is not inconsistent with the adoption by the association of certain tenets which distinguish it from other similar bodies. The right of the Assembly to impose any innovation from established doctrine on a dissentient minority, and the limits of such right (if any), must be found in the constitutional powers of that body, and must be proved by evidence. The historical argument of the learned Dean appears to me on examination to afford but little assistance on this crucial point. Knox's Confession of Faith was not adopted by the General Assembly of the Church, for at that

time the Presbyterian form of Church government was not established, and there was no such body. It was presented by the Barons and others to Parliament, and then passed into law. The statutes of 1638 and the subsequent years were passed during the period which is called in Scotch ecclesiastical history the Second Reformation, and appear to be in the nature of protests against the action of the King's Government, and in some instances the King's Commissioner is supplicated to obtain the ratification by Parliament of the Acts of the Assembly. The Westminster Confession was adopted by an Act of the General Assembly in 1647, and did not it is true receive parliamentary sanction until 1692, after the period of disturbance between the Restoration and the Revolution of 1688 had passed away. It is to be observed, however, that in the Act of 1647, approving the Westminster Confession, it is expressly stated that the said Confession was found by the Assembly to be "in nothing contrary to the received doctrine, worship, discipline, and government of this Kirk." The Assembly, therefore, did not consider itself to be introducing into the Church any innovation in doctrine. The Westminster Confession was intended to be an eirenicon or basis of union between the Churches in the two kingdoms, and the adoption of it by the Scottish Assembly was as much a political as an ecclesiastical act. The Chapels Act and the Veto Act, which were the forerunners and indirectly the cause of the great disruption, can hardly be cited as evidence of the power of legislation which is claimed. These Acts were said by their authors to be declaratory only of existing rights, and although they involved the assertion of the larger principle for which the majority in the General Assembly were then contending, the particular subjects dealt with would seem to come within the scope of the internal management of an unestablished Church. They were held in the Court of Session and in this House in the course of the litigation which ensued to be of no effect, because their provisions (it was held) were at variance with those of Acts of Parliament. It was not necessary, therefore, for the learned judges to give any decision as to the abstract power in the General Assembly to

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pass them. But the dicta of the learned judges were not favourable to the respondents' contention (see the opinions in the first *Auchterarder Case* (1)).

Counsel referred to Chapter VII. of the Second Book of Discipline. The sections numbered from 6 to 8 describe the powers of all assemblies from Kirk Session to an Ecumenical Council, and do not relate specially to the General Assembly. It does not appear to me that any of these sections either confer or recognise the existence of a power in the General Assembly to impose new doctrines on the Church, for that is what is claimed. They seem to be directed to the preservation and maintenance of established doctrine and the reform of abuses. Sects. 21 to 26 describe the powers of what is there called the National Assembly, corresponding to what is now designated the General Assembly. There are large powers for the protection of the spiritual jurisdiction, the patrimony of the Kirk, and generally concerning "all weighty affairs that concern the well-being and good order of the whole Kirks of the realm." But nothing is said as to doctrine. Counsel did not, in fact, bring to your Lordships' attention any work of recognised authority in the Presbyterian Churches in which it is clearly laid down that the General Assembly possesses this plenary power of legislation over doctrine. And I cannot say that it has been proved to my satisfaction that either by inherent right, or by usage, or by contract, the General Assembly of the Free Church has any such power.

But, my Lords, I think that the learned judges of the Court of Session relied principally on the provisions of the Barrier Act, 1697. The first observation is that that Act is a procedure Act, and not an enabling Act. It does not purport to confer any new powers whatever, but it regulates the exercise of such powers as the General Assembly may possess. It is said, however, that the provisions of the Barrier Act contemplate and imply the existence of a power in the General Assembly to make some innovations or alterations in (amongst other things) doctrine. I think this would be true if, after the word "existence," you added the words "or the possible

(1) 2 Robert. 25 et seq. (Special report by Charles Robertson, Edinburgh.)

exercise by the Assembly." The Act may have been passed for the purpose of preventing a majority from making or assenting to sudden innovations and alterations which it was expected or feared might be attempted from within or from without, without very carefully weighing what the strict constitutional powers of the Assembly were. But, my Lords, let it be assumed that the language of the Act does imply the existence of some power. Certainly it is not necessarily an unlimited or general power, and the question then is, what is the extent or what are the limits of the power? It has been said that it is a power to legislate in any manner not inconsistent with the continued existence of the Church. But applying that to the case now before us, what, it may be asked, is the Church but an organized association of Christians holding certain doctrines and principles in common? I was at one time disposed to think that a sound limitation might be found if the power were confined to the interpretation of formularies. But further reflection has satisfied me that if your Lordships were so to hold, you would only be making a more or less plausible but wholly unverified assumption. I also think that not only an accepted interpretation of Scripture, but an accepted interpretation of or inference from a subordinate standard may just as well be an article of faith as any other opinion, and there is no tenable distinction for this purpose between one religious principle or opinion and another. I do not think, for example, that you advance the argument by calling the Establishment principle a question of polity only. I have come to the conclusion that it would be contrary to all principle to infer from the provisions of the Barrier Act, unsupported by any evidence of usage or other evidence, a power in the General Assembly, or the majority, to vary the trusts upon which this property is held to the prejudice of a dissentient minority. I think the Dean of Faculty was logically right in contending for an unrestricted power of legislation. But if the property was intended to be held in trust for a body of Christians holding such doctrines as the majority acting through the General Assembly might from time to time approve, such an intention should be made clear beyond the possibility of question.

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Now, what is it that the General Assembly has done? I shall content myself by referring to three documents. In 1867 there was a movement in the Free Church for union with the United Presbyterian Church. In a report of a committee of the Free Church of that year on union with other Churches there is contained a statement of the United Presbyterian Church committee under the heading of "Distinctive Articles": "That it is not competent to the civil magistrate to give legislative sanction to any creed in the way of setting up a civil Establishment of religion, nor is it within his province to provide for the expense of the administrations of religion out of the national resources; that Jesus Christ, as sole King and Head of His Church, has enjoined upon His people to provide for maintaining and extending it by free-will offerings; that this being the ordinance of Christ it excludes State aid for these purposes, and that adherence to it is the true safeguard of the Church's independence. Moreover, though uniformity of opinion with respect to civil Establishments of religion is not a term of communion in the United Presbyterian Church, yet the views on this subject held, and universally acted on, are opposed to these institutions." I will only ask your Lordships to contrast this language with the views on this subject expressed by Dr. Chalmers, and put forward by the founders of the Free Church in their manifesto entitled "The Affectionate Representation of the Free Church of Scotland, 1843," to which I have already referred. In fact the voluntary principle—i.e., the unlawfulness of accepting aid in any form from the State—was put forward as one of the most distinctive principles of the United Presbyterian Church in a tract published by authority on the jubilee of that Church in the year 1897.

By an Act of the General Assembly of the Free Church dated October 30, 1900, after a recital that a union of the Free Church of Scotland and the United Presbyterian Church of Scotland was in contemplation, and was about to be consummated, it was enacted and ordered (amongst other things) that all property held by trustees for behoof of the Free Church of Scotland should belong to and be held for behoof of the United Free Church of Scotland.

On the following day the Act of Union was passed, and certain declarations were adopted by the United Assembly defining the basis of union, the third of which is as follows:—

"As this union takes place on the footing of maintaining the liberty of judgment and action heretofore recognised in either of the Churches uniting, so in particular is it hereby declared that members of both Churches and also of all Churches which in time past have united with either of them, shall have full right as they see cause to assert and maintain the views of truth and duty which they had liberty to maintain in the said Churches."

In other words, the Establishment principle and the doctrine as to the duty of the civil magistrate towards the Church which was maintained and firmly held by the founders of the Free Church are henceforth to be open questions for members, ministers, and office-bearers, and the property which was placed in trust for the Free Church is henceforth to be held in trust for the maintenance of a Church, in the pulpits of which distinctive tenets of the Free Church may or may not be taught, and, indeed, doctrines at variance with them, and directly contradictory of the Establishment principle, may lawfully be maintained. The appellants also say that in the constitution of the United Free Church another distinctive principle of the Free Church as declared by the founders of that Church has been abrogated, namely, the unqualified acceptance of the Westminster Confession. They point to the change in the language of the question relating to the Confession which candidates are required to answer in the United Free Church. They say that this change, accompanied and explained by the declaration contained in the preamble of the Act prescribing these questions, has the effect of substituting for a belief in the whole doctrine of the Confession of Faith belief in such portions thereof only as the General Assembly may from time to time determine to be of the substance of the Reformed Faith, or (in other words) such portions as the Assembly may from time to time approve. This is not a mere question of interpretation of formularies, and I am disposed to

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think that on this point also the argument of the appellants is well founded. The learned Dean of Faculty rightly said that the substantial question was, whether the United Free Church has preserved its identity with and is the legitimate successor of the Free Church. My Lords, I find myself quite unable to answer that question in the affirmative.

The other case relates to the trusts of buildings held for particular Free Church congregations on trust deeds which are in the form of the model trust deed approved by the General Assembly of the Free Church. The terms of this trust deed were much relied on by the counsel for the respondents, not only with reference to these congregational trusts, but also on the general question. The trust is that the building shall be enjoyed as a place of religious worship by a congregation of the said body of Christians called the Free Church of Scotland, or of any united body of Christians composed of them, and of such body or bodies of Christians as the Free Church may at any time hereafter associate with themselves under the aforesaid name of the Free Church of Scotland, or under whatever name or designation they may assume. The operative part of the deed is preceded by a long historical narrative, which is interesting and appears to me rightly to define the position and constitution of the Free Church, but it does not appear to me to carry the case further than the facts themselves do. Nor do the terms of the trust seem to affect the general question beyond shewing that it was in the contemplation of the parties that the Free Church might unite with some bodies of Christians. With regard to the congregational property, I feel more difficulty. I think the soundest view, however, is to hold that there is a general overriding trust for the purposes of the Free Church, and it was not intended that the majority controlling the Free Church might by subverting the basis of that Church divert the trusts of the congregational property. I think, therefore, that the union here contemplated must be taken to be one with other Churches which might properly be made without detriment to the distinctive tenets of the Free Church. More than one union of that character has, in fact, been made without objection.

For the reasons I have given, I am of opinion that the two appeals should be allowed.

LORD JAMES. My Lords, in the cases before your Lordships for decision, the secular Courts have been appealed to for the purpose of determining differences that have arisen between two sections of the Church, until lately known as the Free Church of Scotland.

The jurisdiction of the Courts, and therefore of your Lordships, to determine such differences proceeds from the fact that property held by trustees upon certain trusts has lately been dealt with, or sought to be dealt with, for the purpose of carrying out a union between the Free Church of Scotland and another body, known as the United Presbyterian Church; and the pursuers in the Court below—the appellants before your Lordships—allege that the application of the properties in question to the purposes of the Churches thus united constitutes a breach of the trusts under which the properties are held.

It is obvious that the first step towards the elucidation of the question before your Lordships' House is to determine the nature of the trusts controlling the properties in question. In order to do so, a brief reference to facts, some of which have become historical, is necessary.

Prior to 1843 the Presbyterian Church of Scotland was in existence as the Established Church. But grave questions deeply affecting the minds and opinions of some of its members had come into existence. The protest of the General Assembly of the Free Church, dated May 18, 1843, complains: "That the Courts of the Church, by law established, and the members thereof, are liable to be coerced by the Civil Courts in the exercise of their spiritual functions and in particular in the admission to the office of the holy ministry and the constitution of the pastoral relation, and that they are subject to be compelled to intrude ministers on reclaiming congregations in opposition to the fundamental principles of the Church and their views of the Word of God—and to the liberties of Christ's people."

On this ground, and apparently on this ground only, a large

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number of the members of the Established Church seceded from it and formed themselves into a new body, under the name of the Free Church. As far as I know, the seceding body adhered to all the tenets and views of the Establishment, excepting upon the above question of secular interference with the spiritual affairs of the Church.

Upon the Free Church thus constituted as a whole, and upon certain congregations of it, considerable property has been conferred by different settlors and donors.

The case set up by the pursuers is, that these properties are held under certain trusts; that those who conferred the properties upon the Free Church intended that they should be applied for the purposes of that Church as it existed at the time when the transfers of property were made. It is also alleged that the Free Church, having united with another body known as the United Presbyterian Church, has so varied its conditions as to cease to retain its original identity. In the Courts below reliance in support of this contention was almost entirely placed upon the argument that a fundamental difference existed between the two Churches in this—that the Free Church acknowledged and asserted the principle of an Established Church, whilst the United Presbyterian Church condemned that principle and was, to the fullest extent, a voluntary Church, accepting Voluntaryism as a necessary and fundamental article of its faith.

Such being the case presented in the Courts below and at the bar of your Lordships' House by the pursuers, it is necessary first to determine to what extent the Free Church was based upon the principles of Establishment. But before entering upon such inquiry it is, I think, worthy of remark that the Church is not a positive, defined entity, as would be the case if it were a corporation created by law. It is a body of men united only by the possession of common opinions, and if this community of opinion ceases to exist, the foundations of the Church give way. But difference of opinion to produce this result must be in respect of fundamental principles, and not of minor matters of administration or of faith.

The basis of the Established Presbyterian Church was

the Westminster Confession of Faith. At the time of the disruption, in 1843, full adhesion to the principles of this important document was declared by the seceders. Article III. of Chapter XIII. of the Westminster Confession is as follows: "The civil magistrate may not assume to himself the administration of the Word and Sacraments or of the power of the Keys of the Kingdom of Heaven; yet he hath authority and it is his duty to take order that unity and peace be preserved in the Church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered and observed. For the better effecting whereof he hath power to call Synods, to be present at them, and to provide that whatsoever is transacted in them be according to the mind of God."

It seems to me that this article clearly enunciates the principle of an establishment, and that this principle, as distinguished from its application, has never been repudiated by those who formed the Free Church.

But the opinion of any one on that point at the present day is of but little importance compared with the views expressed by those who formed that Church. Clear and distinct expression of those views can be found.

In the first place, in the claim, declaration, and protest issued by the General Assembly of the Church of Scotland on May 30, 1842, it is stated (1): "Whereas it is an essential doctrine of this Church and a fundamental principle in its constitution as set forth in the Confession of Faith thereof in accordance with the Word and Law of the Most Holy God, that there is no other Head of the Church but the Lord Jesus Christ (Chapter XXV., s. 6), and that while God, the supreme Lord and King of all the world, has ordained civil magistrates to be under Him over the people for His own glory and the public good, and to this end hath armed them with the power of the sword (Chapter XXIII., s. 1), and while it is the duty of people to pray for magistrates, to honour their persons, to pay them tribute and other dues, to obey their lawful

(1) See Appx. G, p. 737.

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commands, and to be subject to their authority for conscience' sake, from which ecclesiastical persons are not exempted (Chapter XXIII., s. 4), and while the magistrate hath authority, and it is his duty in the exercise of that power, which alone is committed to him, namely, 'the power of the sword' or civil rule, as distinct from the 'power of the Keys' or spiritual authority expressly denied to him, to take order for the preservation of purity, peace, and unity in the Church, yet, 'The Lord Jesus as King and Head of His Church hath therein appointed a government in the hand of Church officers distinct from the civil magistrate (Chapter XXX., s. 1), which government is ministerial, not lordly, and to be exercised in consonance with the laws of Christ and with the liberties of His people.'"

And again in the same document there appears as follows: "And whereas this Church highly valuing as she has ever done her connection on the terms contained in the statutes hereinbefore recited with the State, and her possession of the temporal benefits thereby secured to her for the advantage of the people, must nevertheless, even at the risk and hazard of the loss of that connection and of these public benefits—deeply as she would deplore and deprecate such a result for herself and the nation—persevere in maintaining her liberties as a Church of Christ."

Coming to the protest of May, 1843, we read: "And finally while firmly asserting the right and duty of the civil magistrate to maintain and support an establishment of religion in accordance with God's Word, and reserving to ourselves and successors to strive by all lawful means as opportunity shall, in God's good providence, be offered to secure the performance of this duty according to the Scriptures." Yet the document proceeds to announce separation.

Again, in the pastoral address issued by the General Assembly of the Free Church on the same day, May 30, 1843, it is stated: "Long was it the peculiar distinction and high glory of the Established Church of Scotland to maintain the sole Headship of the Lord Jesus Christ, His exclusive Headship in the Church which is His Kingdom and House. It was

ever held by her indeed that the Church and the State being equally ordinances of God, and having certain objects connected with His glory and the social welfare, might and ought to unite in a joint acknowledgment of Christ and on the employment of the means and reasons belonging to them respectively for the advancement of His cause. But while the Church in this manner might lend her services to the State, and the State give its support to the Church, it was ever held as a fundamental principle that each still remained, and ought under all circumstances to remain, supreme in its own sphere, and independent of the other. On the one hand, the Church having received her powers of internal spiritual government directly from her Divine Head, it was held that she must herself at all times exercise the whole of it, under a sacred and inviolable responsibility to Him alone, so as to have no power to fetter herself, by a connection with the State or otherwise, in the exercise of her spiritual functions. And in like manner, in regard to the State, the same was held to be true, on the same grounds, and to the very same extent in reference to its secular sovereignty. It was maintained that as the spiritual liberties of the Church, bequeathed to her by her Divine Head, were entirely beyond the control of the State, so, upon the other hand, the State held directly and exclusively from God, and was entitled and bound to exercise, under its responsibility to Him alone, its entire secular sovereignty, including therein whatever it was competent for, or binding upon, the State to do about sacred things, or in relation to the Church, as, for example, endowing and establishing the Church, and fixing the terms and conditions of that Establishment."

But perhaps the most explicit declaration on the subject of the principle of Establishment is to be found in the following words of Dr. Chalmers, rendered authoritative by their circulation by the orders of the General Assembly of May, 1843: "The Voluntaries mistake us if they conceive us to be Voluntaries." (These are the words which were read by my noble and learned friend on the Woolsack.) "We hold by the duty of government to give of their resources and their means for

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the maintenance of a Gospel ministry in the land; and we pray that their eyes may be opened, so as that they may yet learn how to acquit themselves as the protectors of the Church, and not as its corrupters or its tyrants. We pray that the sin of Uzziah, into which they have fallen, may be forgiven them; and that those days of light and blessedness may speedily arrive, when kings shall be the nursing fathers, and queens the nursing mothers of our Zion. In a word, we hold that every part and every function of a commonwealth should be leavened with Christianity; and that every functionary, from the highest to the lowest, should, in their respective spheres, do all that lies in them to countenance and uphold it. That is to say, though we quit the Establishment, we go out on the Establishment principle—we quit a vitiated Establishment, but would rejoice in returning to a pure one. To express it otherwise, we are the advocates for a national recognition and a national support of religion, and we are not Voluntaries."

To these declarations of Dr. Chalmers I feel great importance should be attached. Apart from the fact that they were issued under the authority of the General Assembly, Dr. Chalmers was specially appealing for material support for the Free Church as a seceding body; and I know nothing more likely to influence the generosity of donors than the eloquent appeal of such a man as Dr. Chalmers. From him those who gave would seek both guidance and information as to the body upon which their gifts would be conferred.

Then in December, 1843, the Assembly of the Free Church, replying to the address from the Congregational Churches of North Wales, said: "But you misapprehend the nature of the movement we have made in supposing that we have in the least degree altered our views respecting the lawfulness and desirableness of a right connection between Church and State."

That the Establishment principle was adhered to by the Free Church seems to have been accepted in the Court below. Lord Trayner in his judgment says: "It is not open to doubt that the Free Church from its constitution in 1843 down, at least, to its union with the United Presbyterian Church professed the Establishment principle."

Even the separation from the Established Church was apparently intended to be of a temporary character only, because we find in the claim and protest of May 30, 1842, the following statement: "But that it shall be free to the members of this Church or their successors at any time hereafter when there shall be a chance of obtaining justice to claim the restitution of all such civil rights and privileges and temporal benefits and endowments as for the present they may be compelled to yield up in order to procure to their office-bearers the best exercise of their spiritual government and discipline and to their people the liberties of which respectively it has been attempted so contrary to law and justice to deprive them."

Such being the declarations of the seceders at the time of the disruption, I can find no departure from such views at any time before the union with the United Presbyterian Church. On the contrary, between the years 1842 and 1900 repeated declarations of adhesion to the principle of Establishment were made on behalf of the Free Church.

I have thus dealt at length with the position accepted by the Free Church in relation to Establishment, and the result seems to be that the seceders of 1843, having belonged to the Established Church, seceded from it, not because it was an Established Church, but because the principle of the Establishment within it had become vitiated. To the principles of Establishment the seceders still fully adhered; and to the Established Church itself they would gladly have returned as soon as there was any discontinuance of the interference with spiritual government which they regarded as vitiating the true principles of Establishment.

It still has to be considered whether the principle was essential and fundamental or a mere matter of policy. It is difficult to define any positive standard between an essential and a non-essential principle. But surely there is a great gulf between the principle of Establishment and that of Voluntaryism. It seems to me, having read the declarations of the General Assembly and the distinct utterances of Dr. Chalmers, that scant justice would be done to the eloquent leaders of the secession movement of 1843 if we construed them

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as treating the Establishment principle as being non-essential or unimportant.

Still more important is it to consider what was the view of the importance of the principle entertained by those donors who, may be, listened to the appeal of Dr. Chalmers. Would they have regarded it as non-essential? Would they have endowed a Church pledged to Voluntaryism? I think not.

It is a much easier task to gather the views of the United Presbyterian Church on the subject of Establishment. That Church came into existence in the year 1847 by virtue of the union of two Churches which had previously seceded from the Established Church. It is not denied that from first to last the United Presbyterian Church has existed without connection with the State, and as a voluntary Church accepting as a fundamental principle that of Voluntaryism. A most emphatic declaration in favour of that principle was made as late as the year 1897 in a tract, No. XXV., issued by the United Presbyterian Church. Again I quote Lord Trayner's authority in the Court below. He says that it is not open to doubt "that the United Presbyterian Church throughout the whole period of its existence has repudiated the principle of Establishment and professed instead the principle of Voluntaryism."

Entertaining these different views, the Free Church and the United Presbyterians have taken steps, seemingly correct in form, to become united under the name of the United Free Church. And this union is sought by the majority who support it to be imposed on the minority who object to become members of the new United Church, and to take effect upon property held by the Free Church so as to transfer it to the new body, the United Church.

Apparently it was sought to make the union subject to a reservation, so as to leave an independent and different judgment to members of the two Churches. Clause 3 of the declaration of the United Assembly is as follows: "As this union takes place on the footing of maintaining the liberty of judgment and action heretofore recognised in either of the Churches uniting, so in particular it is hereby declared that

members of both Churches, and also of all Churches which in time past have united with either of them, shall have full right, as they see cause, to assert and maintain the views of truth and duty which they had liberty to maintain in the said Churches."

But this freedom to differ, whilst admitting the differences, does not lessen or remove them. The United Free Church, as a whole, holds within it neither the principle of Establishment nor of Voluntaryism; such questions were to be open questions. But the man who as a member of the Free Church had accepted the views of a Church which claimed Establishment as one of its fundamental principles may well object when he is told that he shall no longer belong to a Church holding that principle, but that he must, under compulsion, join a Church wherein members of it may think as they will on this broad subject, and must, whether he wishes it or not, be in communion with the supporters of the voluntary system to the same extent as if they had been adherents to the principle of Establishment in accordance with the tenets of the Free Church.

My Lords, we must recollect that we are dealing with property applied to the use of men in return for services rendered as ministers of the Free Church—to the use of men who have adhered to the tenets of that Church—who have changed nothing, who have varied nothing. From an answer I received from counsel at the bar I learnt that the refusal of these ministers to become members of this mixed body was treated as a matter of discipline; and so the sentence for thus adhering to an old unaltered faith apparently amounts to deprivation.

That this is so seems to proceed from the effect of the Act of October 30, 1900, whereby it was resolved that the whole property of the Free Church should be transferred to and belong to the United Free Church. The assertion that the dissenting minority by so dissenting ceased to be members of the Free Church, and lost and forfeited all their rights and privileges as members thereof, is to be found at statement 15 of the defenders' case. The sentence thus imposed upon the ministers

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who adhered to their old opinions is somewhat draconic: "They separated and cut themselves off from the said Church," says the statement of the defenders, "and by so doing lost and forfeited all their rights and privileges as members thereof. They do not constitute or represent the Free Church of Scotland, and they have no right or title to any property which belonged to the said Free Church of Scotland. They are not members of the United Free Church of Scotland, and they have no right or title to any property belonging to it."

My Lords, there are one or two subjects that must be referred to. Lord Trayner in his judgment says: "But esto that the Establishment principle had been explicitly declared in 1843 to be an essential principle of the Free Church, I think the Church had the power to abandon that principle, and to that extent alter that principle." From this view I differ, because, regarding "essential" as meaning fundamental, I do not think that a Church can change such fundamental principle and yet at the same time preserve its identity. As I understood, it was admitted at the bar this power of change is restricted so as to keep the Church within the limits of identity. The retention of the name does not preserve identity, and yet the change of principles might be so great as to leave nothing but the name of the Church. I think, too, it was admitted by way of example that if change had introduced the doctrines of the Church of Rome the identity of the Free Church would be lost; and surely this view brings us back to the question whether there has been any change of a fundamental or vital principle of the Church, and to this an answer has been given.

An important document, the model trust deed of November, 1844, has also to be dealt with. The respondents naturally rely upon it as shewing that at the very time of the secession it was contemplated that the Free Church might unite with other Churches. I agree that this is so, for the deed sets out a trust in favour of the congregations "of the said body of Christians called the Free Church of Scotland, or of any united body of Christians composed of them, and of such other body or bodies of Christians as the said Free Church may at any time hereafter associate with themselves."

Even if the model trust deed contained no such reference to union with other Churches I should regard the power as existing, for I agree with Lord Young when he says in his judgment that "any two or more Churches may lawfully unite so as to form one Church, and that nothing more is necessary to the union than their own consent, which they are respectively free to give or withhold."

Doubtless that is so in respect of the mere legality of the act of uniting, but different considerations are raised in these suits. We have to deal with the rights of property, with the execution of trusts, and we have to see that the objects the donors had in view are carried out. Such being the case, I do not think that the model trust deed gives greater power of union than the Free Church possessed without it. The Church may unite, and so says the model trust deed, but if property is sought to be transferred to the new body the identity of that new body—that is the Free Church—after the union must be maintained; and nothing in the deed gives a power to unite so as to bring into existence a Church incapable of identity with the Free Church. And if this be so, we are recalled to the consideration of the main question argued in this case.

My Lords, great stress was laid at the bar upon the effect of an Act passed in the year 1697 called the Barrier Act. (1) It was argued that this Act conferred legislative powers upon the General Assembly in respect of matters of doctrine or worship, discipline or government within the Church. I cannot agree in this view. The Act is entitled "An Act anent the method of passing Acts of Assembly of general concern to the Church, and for preventing of innovations." It is a procedure Act regulating the exercise of the existing powers of the Assembly, but conferring no new jurisdiction and increasing no powers. Doubtless the Assembly had before the passing of the Acts certain powers in respect of the matters referred to, and it was thought desirable to enact that such powers should only be exercised after full notice given. That is all the Barrier Act did. Certainly nothing within it gives any power to alter the identity of the Church.

(1) See Appx. G, p. 736.

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My Lords, I have not thought it necessary to enter upon any detailed statement of the law affecting the application of property left in trust for a voluntary body such as the Free Church was. It seems enough to say that sufficient guidance on that subject is to be found in the case of *Craigdallie* v. *Aikman* (1), the decision in which case supplies principles applicable to the present.

I probably have already conveyed to your Lordships the result I have arrived at. After very earnest consideration of the facts before this House, and of the very able arguments presented at the bar, I have come to the conclusion that the appellants are entitled to the judgment of your Lordships. That conclusion is founded upon the grounds I have above referred to. I am thus relieved from dealing with the second ground upon which the union of the Churches is attacked, and I am glad that there is no necessity for me to deal with that interesting but difficult problem presented by the alleged difference of doctrine existing in the two Churches.

I am aware that your Lordships' duty is only to give judgment upon the strict issues raised before you, and that that judgment must lie where it falls; but, even at the risk of exceeding my duty, I venture to express the sincere hope that some way will be found to avoid the capture by either litigants of any spoils of war; and that hope is confident, because I believe that the primary, indeed the only, object of those who have united and those who have dissented has been to promote the interests of the Church, and that equally now will it be their care that the Church as a whole and the individual members of it shall in no degree suffer from the events with which your Lordships have had to deal.

LORD ROBERTSON. My Lords, in the elaborate arguments submitted to the House many questions have been discussed which involve difficult theological and historical inquiries. I have, as in duty bound, carefully considered those various aspects of the controversy, and I have come to the conclusion

(1) 1 Dow, 1, 16.

that the case admits of decision, and ought to be decided, upon grounds much more palpable and certain.

The question is, to whom does certain property now belong which was given to the denomination of Christians which called itself the Free Church of Scotland? That body was founded in 1843; it consisted of ministers and laity, who seceded from the Established Church of Scotland on certain questions of Church polity, but who professed to carry with them all the doctrine and system of the Established Church, only freeing themselves, by secession, from what they regarded as intolerable encroachments by the Law Courts upon the Church's spiritual functions. Rightly or wrongly, the theory of the Free Church was that they, and not the Established Church, were the Church of Scotland.

The Church thus set up was endowed, by the liberality of its members, with the property now in dispute. Two competitors now claim it. Of the respondents, the first remark to be made goes to the very root of their claim. They are not, either in name or composition, the Free Church of Scotland. They are not even the majority of the Free Church, but the assignees of the majority of the Free Church; they are a body formed in 1900 by the fusion of the majority of the Free Church with another body of Presbyterian Dissenters, the United Presbyterian Church. The property of the Free Church is claimed by this composite body, which, to the extent of a third or some large proportion (for the particulars are not before us and are unimportant), is composed of United Presbyterians. Of this new body it may be affirmed nearly as truly that it is United Presbyterian as that it is Free Church, and its name, the "United Free Church," suggests the fact.

Now I do not attach conclusive importance to the name; but it is important and still more significant. In any view, the change of name and the fact of fusion put it on the respondents to prove their identity with the original beneficiaries. They have to do this, too, not in a question with the heirs-at-law of the founders, but in competition with an existing body of ministers and members of the original Free

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Church, who have simply stayed where they were, and about whose pedigree there is no dubiety.

For reasons to be afterwards stated, it is not too lightly to be assumed that such unions are within the competency of any majority, however large, even if there existed no essential differences between the uniting bodies. The present, however, is not a case in which (as in some instances, which will presently be examined in detail) the Free Church has absorbed smaller Presbyterian bodies holding all her own pristine principles, and has done so without any change of her name or formularies. The United Presbyterian Church treated with and joined the Free Church not only formally, but in fact, on at least equal terms. The two bodies which met to consummate the union enacted and declared that the Free Church and the United Presbyterian Church "do and shall henceforth constitute one united Church, that the name of the United Church shall be the United Free Church of Scotland, and that its supreme Court shall be designated the General Assembly of the United Free Church of Scotland." From these proceedings it resulted that, so far as the respondents were concerned, the Free Church judicatories ceased to exist, their place being taken by Kirk Sessions, Presbyteries, Synods, and General Assemblies of the new Church, composed in part of gentlemen who formerly were United Presbyterians, and in part of gentlemen who formerly were Free Churchmen.

On October 30, 1900, the General Assembly of the Free Church made over the whole property of the Free Church to the United Free Church. On the following day, October 31, 1900, the General Assembly of the new Church proceeded to set up a new formulary for the admission of their preachers, which had been preconcerted and made matter of treaty. Whereas a probationer of the Free Church used to be required to affirm his belief that "The whole doctrine of 'the Confession of Faith' is the truths of God," the United Free Church probationer requires to affirm his belief in "the doctrine of this Church" (i.e., the United Free Church) "set forth in the Confession of Faith." (The elasticity of "the doctrine of the United Free Church," which is thus made the object of belief,

is ascertained by the fact that the various matters of agreement between the Churches with a view to union were declared by the United Assembly to be "accepted and enacted without prejudice to the inherent liberty of the United Church as a Church of Christ to determine and regulate its own constitution and laws as duty may require in dependence on the grace of God and under the guidance of his Holy Word.") The United Free Church probationer has also to affirm the general principles of the (United Presbyterian) "Basis of Union, 1847," as well as those of the (Free Church) "Claim of Right of 1842" to be principles sanctioned by the Word of God and the subordinate standards of the Church. I do not at present comment on the importance of such changes, but note them as shewing that the constitution of the new Church is a new constitution enacted by the new and composite body, and adapted to the exigencies of the United Presbyterians.

Another matter of salient importance demands attention. One of the recitals in the Act of General Assembly of the Free Church by which they authorized the union is that, "the committees of the two Churches having met and communicated to one another the existing doctrinal standards, rules, and methods of the two Churches, it appeared that in regard to doctrine, government, discipline, and worship therein set forth a remarkable and happy agreement obtained between them, and also in particular in the views of the two Churches in respect to the spirituality and freedom of the Church of Christ—her subjection to Him as her only Head and to His Word as her supreme standard, and that an incorporating union might harmoniously be accomplished." There is no profession of identity, but of an "agreement" having been "obtained," which is described as "remarkable." Now the steps and stages of these long negotiations are before the House, and from these it appears that on this question of Establishment there were in 1863 and in 1867 sharp differences. The tenets of the two bodies are printed in parallel columns in the printed papers, and I am going shortly to refer to them.

Nothing before the House shews or suggests that the United Presbyterians departed by an iota from their own doctrine. On

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the other hand, there is no avowal by the Free Church that she departed from the position formulated in the parallel columns. What was done was simply to drop the subject and unite.

While such is the name and such the composition of the respondents' body, the position of the other competitor, the appellants, is very much simpler. They are those ministers and laity of the Free Church who did not concur in the union of 1900, but protested against it; they have done nothing but remain where they were, holding to the letter all the doctrines of the Free Church, adhering to it as an institute, and continuing its existence according to the measure of their powers. They say that in the event which has happened they are the Free Church—their brethren having left them for this new Church—just as those brethren might have left them for the Establishment or for the Episcopalians. They have, however, been declared by the respondents no longer to be of their communion, and their manses and churches have been formally claimed by the respondents for their own exclusive use. The adherents of the appellants are numerically few—some few thousands—but it has not been suggested that this introduces any legal difference from the situation as it would have been had they been more numerous. Since the days of Cyrus it has been held that justice is done by giving people, not what fits them, but what belongs to them.

Such being, in sketch, the relative positions of the two claimants to this property, it is plain that the respondents can only succeed by making out that it was an inherent quality of that Free Church to which this property was given that it could transform itself in the way that I have described, and oust from the property those who desire to remain where they were, in principle, doctrine, and organization. For let it not be forgotten that the contention of the respondents necessarily involves that the majority is entitled, not merely themselves to retain the property, but (1.) to introduce the United Presbyterians as beneficiaries, and (2.) to oust the dissentient minority from the benefits of the foundation. This is why I protested at the outset against the too ready acceptance of the doctrine that "union" is competent to a majority.

In considering this contention, I steady myself by dwelling on an observation very frequently repeated by the Dean of Faculty in his able speech for the respondents. "This case," said the Dean, "differs from all previous cases in the same region of law in this—this is a gift to a Church," not to a congregation, nor for the promotion of certain doctrines, but to a Church named and designated. I think there is great force in this, but in another way from that intended. This property was given to the Free Church, an existing Church, complete within itself as an ecclesiastical organism and separate from other Churches. This becomes extremely clear when it is remembered that there were already existing, at the moment of the disruption, the two dissenting Presbyterian bodies which now form this very United Presbyterian Church, and that the incorporation of those two into the United Presbyterian Church took place in 1847, during those early years of the Free Church when this property was being accumulated. Those dissenting bodies were, so far as worship, doctrine, discipline, and government were disclosed in their standards, exactly the same as the Free Church which was set up side by side with them. Accordingly, even if we knew nothing to corroborate the inference which this gives rise to, the broad fact is that the Free Church was set up as an independent Church separate from those with whom the recent union has now been effected. Therefore, with the Dean of Faculty, I say this property was given to a particular Church, and it is very difficult to see that it will do to end that Church, and then, picking up most of her doctrines, come forward to claim that United Presbyterian and Free Church alike shall share as members of a body which is not even called the Free Church.

When the history of the foundation of the Free Church is more closely examined, we see that it was not fortuitously or from mere love of separation that the Free Church was founded and endowed as a Church separate from the two confluents of the United Presbyterian Church.

Those existing dissenting bodies held opinions about Church government and Church and State which were inherited and carried forward by the United Presbyterian Church; and in

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1843 they, as after 1847 their successor the United Presbyterian Church, were the exponents in Scotland of voluntary principles. By this, as it ought to be unnecessary to say, I mean, not merely that in fact they were not endowed by the State, but that they were opposed on principle to the endowment of religion by the State. It is honourable to the United Presbyterian Church that, in good times and in bad, it has never used ambiguous language or nicely balanced phrases about this matter, and has never sailed under false colours. All through the negotiations with the Free Church, as before them, it was strenuous and busy in "diffusing a knowledge of the voluntary principles of the Church"; it year by year upheld "the Church's testimony on the proper relations of Church and State, and in favour of religious equality by disestablishment and disendowment," and "renewed the testimony of 1847, constantly maintained, 'That it is not within the province of civil government to provide for the religious instruction of the subject.'"

In order, once for all, to ascertain precisely the true position of the United Presbyterian Church upon these subjects, it is convenient to read the statement of their distinctive principles made by their committee when negotiating for union with the Free Church in 1867; and the passage has a special value, because, in the circumstances, it was not likely to contain overstatements on controversial points. It stands out also as a landmark because it has never to this day been abandoned by the United Presbyterian Church, either before, in, or after their union with the Free Church. Here is what is said: "That it is not competent to the civil magistrate to give legislative sanction to any creed in the way of setting up a civil establishment of religion, nor is it within his province to provide for the expense of the ministrations of religion out of the national resources; that Jesus Christ, as sole King and Head of His Church, has enjoined upon His people to provide for maintaining and extending it by free-will offerings; that this being the ordinance of Christ, it excludes State aid for these purposes, and that adherence to it is the true safeguard of the Church's independence. Moreover, though uniformity of opinion with

respect to civil establishments of religion is not a term of communion in the United Presbyterian Church, yet the views on this subject held and universally acted upon are opposed to these institutions."

All of this declaration is very clear, but the closing sentence has a special significance in regard to the whole of the present case. On paper, the United Presbyterian Church held just the same general doctrines as the other Presbyterian Churches; like them, she held the Scriptures to be the only rule of faith; as with them, so with her, the Westminster Confession and Catechisms were her Confession and Catechism. None of her formularies made mention of Voluntaryism or exacted the profession of that principle from her office-bearers or members. The learned judges whose decision is now under review would, I suppose, have thought that this fact removed all ground of division between the voluntary bodies and the Free Church bodies in 1843. But the founders of the Free Church were not content with these criteria of the distinctive notes or testimonies of a Church, and they declined to coalesce with the Voluntaries, although Voluntaryism was not then, any more than now, a term of communion in those bodies. "The Affectionate Representation of the Free Church of Scotland, 1843," is conclusive on this point, and it has a peculiarly direct authority and relevance in the present controversy. It has been called, and I think accurately, "the prospectus" of the new Church, and it states the grounds and principles on which support was asked for it. Now this manifesto or prospectus discusses this very question of the proper relations of the Free Church to the Dissenters, who now form the United Presbyterian Church. The manifesto seems to anticipate the not unnatural objection to the formation of a new Church, that here were existing orthodox Presbyterian Churches—why not join them? The answer is conclusive. That would be against our principles. And in two very eloquent pages—for the writer was Dr. Chalmers—the Establishment principle is urged upon those addressed, in the most peremptory terms, as being still binding on them as "a doctrine or article of faith"—the Voluntaries are warned that they mistook the Free Church if

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they conceived them to be Voluntaries; and it is emphatically asserted for the Free Church that, "though we quit the Establishment we go out on the Establishment principle; we quit a vitiated Establishment, but would rejoice in returning to a pure one." The same attitude is politely but firmly expressed in the General Assembly's replies to the various bodies of Voluntaries who addressed the Free Church with congratulations at the time of the disruption. They are all asked not to mistake the Free Church for Voluntaries.

The conclusion which I draw from all this is that it was of the essence of the foundation to which this property belongs that it should be a Church separate from voluntary Dissenters. On broader grounds, though closely connected, it is difficult to see how the pretensions of the Free Church, such as they were, could have been embodied in anything but a Church of her own. Her theory was that she was, amid right-hand and left-hand defections, the Church of Scotland—the Church of the first and the second Reformations—the burning bush, never consumed. With all Presbyterians, this is a noble claim to allegiance; nor was it the less inspiring in 1843, because the Church had been (as she held) unjustly deprived of the benefits of Establishment, and her loyalty to the principle of national religion was proving itself to be of the sort that is true although it be not shone upon.

Now, in dealing with the question before your Lordships' House, it is necessary from the outset to bear firmly in mind that the Establishment principle can be held by Churches that, in fact, are unconnected with the State, and are, in fact, supported by voluntary contributions alone. I should have thought this the necessary hypothesis of the whole question, as we have to do with a dissenting Church; but in two passages of the learned judges' opinions, afterwards to be adverted to, this seems to be forgotten.

Again, the intrinsic importance of any particular doctrine in relation to the general body of Christian teaching is no criterion of whether it is or is not an essential or fundamental doctrine in a particular Church, and least of all in Scotland. It is not its own importance, but the place assigned to it in the foundation

of the new Church that has got to be ascertained. I dwell on this for a moment, and illustrate it from the case in hand. Whether the Establishment principle is or is not a fundamental doctrine of the Free Church is the dispute in this case; but there is no doubt at all that the claim of the Free Church as against the Law Courts (I put it shortly) is of the essence of her foundation. This question is settled, not because the judges or your Lordships so appraise that doctrine, in comparison with all the various docrines of faith and morals set out in the Confession of Faith, but because that was the undoubted ground on which the new Church was set up. Now I observe in Lord Low's very able judgment that he makes much of the fact that here were two Churches identical in doctrine, worship, and form of government, and they were working together in the same field, so that their agencies overlapped and their efforts were to some extent wasted. And his Lordship goes on to speak of the duty of unity among Christians.

This is all very true; but then these considerations were full in view of the founders of the Free Church. This is not a case where the new Church was set up in Scotland to preach the Gospel to people who were not within reach of the common doctrines of Christianity, or even of Calvinistic Christianity. In the theory of the founders of the Free Church, it was intolerable that their adherents, although agreeing in all other matters, should continue to worship along with those who were content that the Court of Session should force the presbytery to ordain the patron's presentee, and do all the various things which led to the disruption. In fact, again, they set up their churches side by side with those of the other Presbyterian bodies who also held exactly the same doctrinal standards. And the evil consequences of having two separate churches instead of one, which Lord Low adverts to, being palpable and flagrant, then as now, the just inference seems to be that the founders of the Free Church deemed the difference between themselves and the Voluntaries so vital that the duty of Christian unity must give way to the more imperious duty of Christian fidelity to truth. In the same fashion the older secessions had taken place on questions not about any of the doctrines of personal

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religion or of theology, but about Church polity. Questions of polity had, in short, been in Scotland often made the causes of separation between Churches, and in 1843 this unquestionably was again the case. The only question is, Was the doctrine of polity on which the Free Church was founded solely what was called spiritual independence, or did it not also comprehend the Establishment principle?

I am, of course, not to be understood as speaking in praise of separation (or of any doctrine on one side or another of this dispute), but no one will understand the present case unless he receives into his mind the possibility of people valuing separation as a safeguard for doctrines which they hold intensely, and as to which they know that the surrounding world is indifferent or hostile. And the error of the respondents seems to me to be that, shutting their eyes to the extremely special and limited raison d'être of the Free Church, and contemplating themselves as a Christian Church, they measure the importance of any doctrine in relation to Christianity as a whole, and not with reference to their own distinctive origin.

Another fallacy must be guarded against. To prove that spiritual independence is more important than the Establishment principle is only to prove that the latter is in importance subordinate to the former; but it does not entitle us to call the Establishment principle a principle of subordinate importance. The true question, as I view the matter, is whether the two doctrines (spiritual independence and Establishment) have not been made by the founders of the Free Church complementary parts of one doctrine.

The instrument of the highest and most direct authority, as evidencing the position of the Free Church, is the protest of 1843. It was, by Act of Assembly, enjoined on the presbyteries to record this protest, together with the Act of Separation and Deed of Demission, at the beginning of their presbytery books as the ground and warrant of their proceedings. The protest seems to me, on the face of it, amply to support the "Affectionate Representation" (already referred to) in the assertion that "we come out on the Establishment principle." The protest is that it shall be lawful to

them, in the circumstances in which they are placed, to withdraw from the existing Establishment (as if this act required defence); but they make this protest "while firmly asserting the right and duty of the civil magistrate to maintain and support an establishment of religion in accordance with God's Word, and reserving to ourselves and our successors to strive by all lawful means, as opportunity shall in God's providence be offered, to secure the performance of this duty agreeably to the Scriptures," and so on. Your Lordships have doubtless read the document as a whole, and there is nothing in the context which detracts from the significant and solemn emphasis of what I have quoted. They had come to the conclusion that, in the circumstances in which they found themselves, "a free Assembly of the Church of Scotland as by law established cannot at this time be holden," and therefore, and therefore only, they came out.

The claim, declaration, and protest of 1842 is referred to in the protest of 1843 as setting forth the true constitution of the Church. Now Lord Low, admitting that in this document also the Establishment principle is affirmed, remarks that it is "in a parenthetical way." The simple explanation of the form of the sentence, and of the lesser saliency of the position assigned to that principle in this paper, is that it is a manifesto from and by an Established Church. The motive of the paper is to protest against interference with the judicatories of that Church. Accordingly, the hypothesis is that Establishment as a principle requires no vindication or assertion; and it in fact only enters the argument when the loss of Establishment is referred to as one of the national dangers impending. But the references in this connection are of unmistakable import.

The unqualified language of the protest of 1843, the document which, as we have seen, each presbytery was to take as the warrant of its proceedings, stands witness, therefore, of the distinctive principles of the Free Church. I have already spoken of the Affectionate Representation of 1843 as the manifesto on which endowment was invited; and these two historical papers are those which bear most directly on the question, What are the trusts of this foundation?

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There are a number of authoritative documents of the General Assembly in following years; and, having examined them all, I find them all to bear out the statements made to the public in the affectionate representation. The degree of prominence attached to the one or the other of the Church's doctrines of course depends on the occasion of the pronouncement, and it would be unfair to isolate any statement from its motive and context. I shall mention three utterances as instructive in more ways than one, especially as the first of these is founded on by the respondents.

In 1851 (the matter in hand rendering this appropriate) it is spiritual independence that is put into the "parenthesis" and the Establishment principle that is substantively asserted. "While this Church has ever held that she possesses an independent and exclusive jurisdiction or power in all ecclesiastical matters," and so on, "she has at the same time always strenuously advocated the doctrine taught in Holy Scripture, that nations and their rulers are bound to own the truth of God and to advance the Kingdom of His Son." The Assembly goes on, in a historical review of Scottish history, to illustrate how this had been done and how it had not been done, the first instances approved being the statutes establishing the Church in 1567 and 1592. Now in this paper there occurs a passage which has been founded on by the respondents, in which the Assembly says that "it is her being free and not her being established that constitutes the real historical and hereditary identity of the Reformed National Church of Scotland." Of course it is not the fact of her being established that constitutes the identity, or the Free Church claim would be impossible. But I entirely fail to see what this has to say to the principle of Establishment. This argument of the respondents is merely another instance of the recurring fallacy which confuses the fact of a Church being established with the holding by a Church of the Establishment principle.

The "Act VII. 1853" is "anent the principles of the Church"; it is short and unequivocal, and it contains an authoritative exposition or gloss of the claim, declaration, and

protest of 1842 and the protest of 1843. It "declares that this Church maintains unaltered and uncompromised the principles set forth in the claim, declaration, and protest of 1842 and the protest of 1843 relative to the lawfulness and obligation of a scriptural alliance between the Church of Christ and the State." It will be remembered that in the protest the protestors reserved to themselves and their successors "to strive by all lawful means to secure the performance of the duty of the State to support an Establishment of religion in accordance with God's Word." So now the General Assembly goes on to explain that there is not, in 1853, any "present call" to take steps in that direction. This, the return to a purified Establishment, was the only "union" ever thought of by the old Free Church.

The only other Act of Assembly of the Free Church to which I need refer is that of 1873, in which, in full view of the United Presbyterians—for the Act relates to the mutual eligibility of their ministers—the Assembly "declare their adherence to the great fundamental principles of this Church, regarding, first, the sole and supreme authority of the Lord Jesus Christ" (I need not quote this in full—it is the doctrine of spiritual independence); and, secondly, "the prerogative of the Lord Jesus Christ as head over all things to His Church and supreme over nations and their rulers, who are consequently bound collectively and officially as well as individually and personally to own and honour His authority, to further the interests of His holy religion, and to accept the guidance of His Word as making known His mind and will." We are now, in 1873, entering the zone of negotiation, and the language is becoming a little general; but the important thing is that the doctrine about the State, whatever it was, is put abreast of the doctrine about spiritual independence, the two being declared "great fundamental principles of this Church." And what the second of these doctrines was in 1843 is not in doubt.

What has now been said relates to authoritative declarations of the Free Church herself; and now a word must be said of her inherited standards. I shall put the argument very low indeed when I say that the Confession of Faith, on the face

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of it, is consistent with the high place given by the Disruption leaders to the Establishment principle. It is quite certain that the Confession of Faith is inexorably opposed to the theory of religious equality, which is, as we have seen, to this day avowed by the United Presbyterians, who now form part of the respondents' Church. The notion that the State is to stand neutral between good religions and bad, which is what is meant by religious equality, is diametrically opposed to the whole teaching of John Knox. Upon this subject, and on this occasion, I cannot do better than quote from one of the Disruption leaders themselves, the historian of "The Ten Years' Conflict" (1876 edition, pp. 39 and 41 of vol. i.). "Knox," says Dr. Robert Buchanan, "and his enlightened and able associates were clear and decided about these two things: first, that no State can, without grievous sin, lend its countenance to the Roman Antichrist or to any false religion whatever; and, second, that every State is bound to embrace, acknowledge, and encourage the true religion." "In Scotland, as everywhere else, at the period of the Reformation, the duty of the State to own and uphold the true religion was looked upon as a first principle, which did not require and hardly admitted of discussion." To those who realize the high theocratic views of the sixteenth and seventeenth centuries in Scotland, it is easy to understand that the autonomy of God's Church and the duty of the State to support it were but two essential parts of the one great conception of a Christian nation. And this is in truth the clue to the Disruption documents.

On the specific question about the 23rd chapter of the Confession of Faith, I own that I read with some surprise that doubts had been entertained by learned judges as to the effect of the words that it is the duty of the civil magistrate to "take order that" "the ordinances of God" be "duly settled, administered, and observed." I must still take leave to think that those words do describe what we call Establishment; and I observe that in the *Campbelton Case* (1), where these observations were made, the question

(1) *Galbraith* v. *Smith*, (1837) 15 S. 808; (1843) 5 D. 665.

before the Court was State endowment, which is a different thing.

On all the grounds which I have stated, I come to the conclusion that the doctrine of Establishment was one of the distinctive and fundamental doctrines of the Free Church.

I shall now mention one or two points in the judgments in the Court of Session, so far as relating to that question, which demand attention. Lord Trayner, whose judgment is most clear, has stated a very curious objection to the likelihood of the Establishment principle being a fundamental doctrine of a Church. His Lordship finds it "difficult to hold that a mere opinion as to what some third person was bound to do, which he might neglect or refuse to do, and which the Church could not compel him to do, could in any way be an essential part of the constitution of the Church which held that opinion." This difficulty really arises out of the time-honoured personification of the State as the civil magistrate. It would certainly not have been admitted by John Knox, even when Queen Mary represented the civil magistrate. And in these latter days of popular power the civil magistrate sits in every pew, and his religious duty may be preached from every pulpit.

Again, Lord Trayner thinks that "the history of the Free Church shews that as a Church, apart from the opinions of individual members, it did not regard the Establishment principle as one of its fundamental principles." I pause to observe that I have founded in no instance on the opinion of individual members, but on the collective and official declarations of the Church. Now his Lordship's first point is, "It was from the commencement and down to the date of its union a Church conducted and maintained in point of fact according to the voluntary principle. If in theory it was something else, the theory did not square with the fact." This comes to no more than that the Free Church had not, in fact, State endowment, which is the hypothesis, without which no question could arise. His Lordship's next point is that the Free Church not only did nothing to give effect to the Establishment principle, but, on the contrary, devoted much of its time and energy to bring

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about, if it could, the disestablishment of the Church of Scotland. Now this agitation took place only in the later and, as the appellants would say, the backsliding days, when union with the Voluntaries also came in view. The important correction to be made is that nothing of this kind took place in times which in any possible view can be looked to as evidencing the principles of the Church set up in 1843, and, therefore, as fixing the scope of this foundation.

I find in Lord Trayner's judgment an antithesis set up between matter of faith (and sometimes the Latin equivalent is used) and matter of polity. This can only be important if what is matter of polity, as distinguished from matter of faith, cannot be made by a Church one of its distinctive and fundamental doctrines in the sense of this controversy. I have already given my reasons for thinking this untenable, and the distinction, therefore, inconclusive.

The Lord Justice Clerk attaches very great, and Lord Trayner great, importance to the decision in the *Campbelton Case* (1), to which I have already alluded. Now that decision was that the principle of State endowment was not an essential or fundamental doctrine of a particular congregation in Campbeltown. It was not a Free Church congregation at all, and the question arose before 1843. The judges thought that its mere adherence to the Confession of Faith did not pledge that congregation to the doctrine of State endowment. But what in my judgment ties the Free Church to the doctrine now in question is a series of acts with which the Campbeltown congregation had nothing to do, and the doctrine is State Establishment.

I must add that the grounds upon which the Lord Justice Clerk comes to the conclusion that the principle of Establishment was in the early days of the Free Church treated as "subordinate" do not seem very cogent. In the first place he quotes, as proving the doctrine of "the early days," two documents which belong to the later days, 1871 and 1873, and must be read in the light of their dates. But, further, to say that in 1843 the "principle" of Establishment was

(1) 15 S. 808; 5 D. 665.

"repudiated" is to ignore the whole theory of the appellants' case and the argument it gives rise to.

Lord Low decided the case on the ground that the Establishment principle was not so essential that the General Assembly could not depart from it. He expresses a cautious and guarded view as to its power to deal with what he deems more essential doctrines. The Lord Justice Clerk seems to take much the same view, but he rates very high the "legislative" power of the Church. Lord Trayner, however, takes a much bolder position: "Esto that the Establishment principle had been explicitly declared in 1843 to be an essential principle of the Free Church, I think the Church had the power to abandon that principle and to that extent alter the original constitution." Lord Trayner's view was argued at your Lordship's bar with great vigour and confidence.

Before proceeding to consider this argument, I ought to point out that the judgment of Lord Young is wholly rested upon the ground, stated in very sweeping terms, that there is nothing to prevent a dissenting Church from abandoning a religious doctrine, however essential and fundamental, and that an ex facie absolute property title cannot be limited by reference, not expressed, to "the essential doctrines and fundamental principles in the constitution of the Church." It is unnecessary to say more of this ground of judgment than that it is in flat contradiction of the decision of your Lordships' House in the case of *Craigdallie*. (1)

The more plausible theory of the respondents is that there are to be found inherent in the Free Church some extremely elastic powers of altering her constitution. Those powers, it is said, were as much a quality of the Free Church when it received the endowments now in dispute as the doctrine of Establishment, and any one giving to the Church gave on that footing. This must mean, if it has any effect on the present controversy, that such alterations may be made by a majority of the General Assembly with the consent of a majority of presbyteries. The extent of the powers so claimed is shewn by the respondents' counsel having avowed that they held that

(1) 1 Dow, 1, 16.

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the Free Church could do away with the Confession of Faith as one of her standards; and Lord Trayner is not prepared to say that the doctrine of the Divinity of Christ does not stand in the same precarious position.

I shall state in advance the answers to this view, and then examine the opinions of the Court in a little more detail.

First, the learned judges have greatly overrated the "legislative" power of the Church, misled by what I think an erroneous construction of the Barrier Act. Second, putting this legislative power as high as you choose, it is a power affecting the internal affairs of the Church, and has no relation at all, and for historical reasons could not have, to such operations as this union of 1900. Third, the Lord Justice Clerk has been completely misinformed as to the tenets of the three dissenting bodies whose unions with the Church of Scotland in 1839, and the Free Church in 1853 and 1876, his Lordship regards as precedents; and this error brings to the ground the argument from actual practice.

The main ground of the respondents' argument is the Barrier Act of 1697. It is an Act of the General Assembly, and Lord Trayner says that it "confers" on the Assembly a certain legislative power. Now if the Barrier Act be examined it will be seen that it does not "confer" or purport to "confer" any legislative power. What it does is, it imposes certain checks on sudden alterations or innovations in doctrine, worship, discipline, or government. The respondents' argument is that this implies that the General Assembly has unlimited power of legislation in the matters named. I do not think this a legitimate deduction. The Act, on the contrary, rather hints that some recent Acts had been of questionable legality, or at least had not commanded "exact obedience." It names doctrine, worship, discipline, and government, not as being the ambit of the Assembly's power, but as the regions of apprehended attack. When all this is read in the light of contemporary history, the motive of the Barrier Act is obvious as a desire to ward off incursions of the Episcopalians. And I do not think that at the very most it comes to more than furnishing some evidence that the General

Assembly either had been dealing, or might be induced to deal, with those high matters. The respondents' argument incidentally called attention to a prior Act of Assembly about innovations, which is instructive in the same direction. For this Act, August 6, 1641, forbids novation in doctrine to be brought in or practised in the Kirk unless it be first propounded, examined, and allowed in the General Assembly. The inference from this, if the respondents' argument were applied to it, must be that, according to use, novations in doctrine had formerly been brought in by the inferior Courts or officers of the Church, and that this was the law.

But on the question of historical fact there is no need to rely on the implications (for they are no more) of one Act of Assembly. Where is the Act—where are the Acts—which evidence the actual exercise of those powers? The respondents' appeal to the Act of 1560, adopting Knox's Confession of Faith, entirely fails them. It was adopted by the Estates, as Mr. Taylor Innes very justly observes in a passage which appears in the first, though not in the second edition of his admirable work on Creeds. "Nothing," he says, "can be clearer than that the doctrine was not adopted in any way upon the authority of the new-born or Reformed Church; all the forms of free and deliberate voting of the doctrine as truth, as the creed of the Estates, not of the Church, were gone through." Of the other most extreme instances of independent action which were cited, it may be observed that the Book of Discipline was not an alteration of an existing creed, except to the indirect extent to which an added standard usually affects the authority of the old, even if (as here) both old and new were consentaneous; that the adoption of the Covenant was a revolutionary act in a revolutionary time; that the Westminster Confession of Faith, while it was adopted by the General Assembly (with certain qualifications), was the offspring of parliamentary action, initiated before the General Assembly took it up. Of the two modern instances, the Chapel Act and the Veto Act, the Chapel Act was held by its authors to be so clearly declaratory that it was not sent down to presbyteries under the Barrier Act, and the whole theory of

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the Free Church party was that neither Act was an alteration of the constitution of the Church, so much so that the Assembly hesitated before sending the Veto Act to the presbyteries.

The case of the respondents, therefore, on the Barrier Act does not stand the test of examination, and does not support their theory that, in giving to the Free Church, the pious founders of the Free Church were knowingly giving to a Church one of whose inherent qualities was that she could alter her essential principles. Neither history nor law make this out.

The House is in a much better position to deal with this question after the rehearing than before it, because of the complete presentation in print of the historical documents relied on. In my own case, a very careful study of those papers has largely increased my confidence in rejecting the respondents' argument. I find nothing from beginning to end which supports the theory that the Church of Scotland exercised or claimed the right to alter doctrines which she had asserted to be scriptural. (I am not now, of course, speaking of the doctrine of Establishment, which is in dispute, but of doctrine generally, and more especially of the Confession of Faith.)

Amid the mass of documents the Second Book of Discipline has been confidently relied on by the respondents. Conceding, as I think is their right, that this book was an adopted standard of the Free Church, I fail to discover in it any help in their present trouble. That it stood them in good stead about non-intrusion is certain, but this is not hujus loci. What strikes any one who reads the book through is that it is not, and does not purport to be, a picture of an existing institution, and even as an ideal it is vague. As matter of fact, it was promulgated before the system of Presbyterian government had been systematized and set up in Scotland. It is not surprising, therefore, that beyond negativing the theory of Episcopacy it contains no recognisable description of the Scotch Presbyterian Kirk as an ecclesiastical organism, and more particularly it never confronts the question with which your

Lordships have to deal, namely, What control has that ecclesiastical organism, even when taken as a whole (and still less when examined in its parts), over her doctrine? The truth is that here, as throughout the case, the respondents mistake the emphatic denial of the right of the State to meddle with those matters for an assertion of the right of the Church to absolute power over her own declared doctrine. The passage mainly relied on (Chapter VII., head 8) proves too much, for it applies to all the four kinds of Assemblies; but, on the face of it, it deals with ordinances depending for their utility on circumstances of time and place, and this cannot possibly include doctrine. The only hint or reference to the subject of doctrine in relation to a judicatory (in VII., 25) would rather imply that œcumenical councils are the bodies to declare doctrine; but this is not clear, and it is enough to say that the subject now before us is not dealt with in relation to the Scotch Kirk.

One admitted fact, indeed, in what may be called the consuetudinary law or common law of the Established Church and the Free Church, directly negatives this theory of the unrestricted command of the Church over her creeds. The General Assembly itself is made up of Commissioners, and each commission is in writing. By immemorial custom, this commission bears that the Commissioners are to repair to the Assembly "and there to consult, vote, and determine, in all matters that come before them, to the Glory of God and the good of the Church according to the Word of God, the Confession of Faith, and agreeably to the constitution of the Church, as they shall be answerable." Now I must own my inability to see how it would fall within this mandate to do away with, or help to do away with, the Confession of Faith as a standard of the Free Church; and I mention this as testing the argument for the unlimited power of the General Assembly under the Barrier Act.

It has, indeed, been attempted to use one remark of Lord Cranworth in *Forbes* v. *Eden* (1) as implying that in all Churches there is a legislative power. The case was that of a specific change in one of the canons of the Scottish Episcopal

(1) (1867) L. R. 1 H. L., Sc. 568.

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Church made by the Synod of that body, and I do not think it was laid down as law that powers of legislation are necessarily inherent in every dissenting body, this being in each case really a question of fact. But Lord Cranworth's remarks make perfectly clear that what he is speaking of is entirely internal regulation, and it is here that the whole argument of the respondents about legislation falls short of the required conclusion.

To revert to the Presbyterian Church of Scotland. It may be a merit or a demerit, but the original and historical theory of the Reformed Church of Scotland was that within and not outside her pale was truth to be found. Without were Prelatists and Papists. When, later on, some Presbyterians had held aloof from the Revolution settlement, and, still later, others had made the several secessions of the eighteenth century, their attitude and the attitude of their parent Church never raised the question of comprehension, the seceders in more than one instance having been deposed. The single instance which we referred to in pre-disruption days of a dissenting body coming back into the Church was the return of the Associate Synod in 1839, and it is enough to say that while the Act of Assembly is called "Act anent Reunion with Seceders," each office-bearer of the Associate Synod was required, before taking his seat as a member of presbytery, to subscribe the Westminster Confession of Faith and the formula of the Church of Scotland; and this being done they were "received," and were declared to enjoy all the rights and privileges of ordained ministers and elders of the Church of Scotland. In passing, it may be noticed that one of the recitals in the Act is, "whereas the members of the Associate Synod do heartily concur with us in holding the great principle of an ecclesiastical establishment and the duty of acknowledging God in our national as well as our individual capacity." The only reservation made by the returning dissenters was "reserving only to themselves the right which the members of the Established Church enjoy, of endeavouring to correct in a lawful manner what may appear to them to be faulty in its constitution and government." If it had been desired to

furnish an illustration of a contrast to the union now in question, it would have been difficult to picture one more complete than it thus supplied by history.

The second case of "union" is that of the Original United Seceders, another of the bodies who held by the Covenanting traditions. They, in 1852, had come to be satisfied that "we may, with honour and consistency, drop our position of secession and maintain our principles in communion with the Church of Scotland," i.e., the Free Church. Accordingly they were "received and admitted" by the Free Church "as pastors, congregations, and kirk sessions of the Free Church of Scotland."

The other case of union took place in 1876, also in the days of the Free Church. It is founded upon by the Lord Justice-Clerk in his judgment under a misapprehension, which unfortunately enters pretty deeply into his Lordship's judgment. The Lord Justice Clerk says of the Reformed Presbyterian Church that it "certainly did not hold the Establishment principle"; and for this surprising statement he gives as his reason that since 1689 they declined to become members of the Church of Scotland as established, abode by their objections to the Revolution settlement, and did not "commit" themselves "to an approval of an alliance of the Church with the British State as at present constituted, having in view especially the unscriptural character of its ecclesiastical relations." Now so far from the Reformed Presbyterians not holding the Establishment principle, they were the ecclesiastical heirs of the Covenanters, who held it passionately, and they represented the extreme right in Presbyterian orthodoxy. But they washed their hands of the Revolution settlement, because the same State which established the Presbyterian Church in Scotland ignored the "second Reformation," and established in England the Prelatical Church, against which woe had never ceased to be denounced by the Church of the second Reformation. Accordingly, the attitude of the Reformed Presbyterians on the Establishment question was exactly analogous to that of the Free Church—holding the Establishment principle, they held

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aloof from the existing Establishment because, as they held, constituted on wrong terms. The statement of the Lord Justice Clerk, therefore, can only be supported if his Lordship means that men do not hold the Establishment principle if they decline to join the Establishment as constituted at the time. And if this be sound, it furnishes (as already pointed out) a very simple end of the present case.

The net result, then, of the history of these unions is this, and nothing more, that where the General Assembly have been satisfied about Presbyterian bodies that they held the same standards as themselves, and were sound on the Establishment principle, those bodies have been admitted with full honours.

I have hitherto discussed the case relating to the general property of the Free Church, and I have come to the conclusion that the appellants are entitled to prevail. The other action only differs because of the model trust deed. Of it I have only to say that it is, and was treated in its inception as, a conveyancer's instrument; that its clauses about union seem to me to apply necessarily only to such unions as were competent to the Free Church; and that they are entirely satisfied, and were probably suggested, by such cases as had occurred. It is not in such a deed that you can look for constitutional changes, or for new powers not hitherto possessed.

Regarding the whole of the property now in dispute, I cannot see how, in law or in fairness, a majority of the men who acquired it on the representations made in the affectionate representation could have been allowed, say in 1850, to carry off the property to the Voluntaries and come forward, arm in arm with the Voluntaries, and claim it for the fused body. And after all the argument we have heard, I have discovered no reason which makes that fair and lawful in 1900 which would not have been so fifty years earlier.

A serious and weighty argument was addressed to your Lordships on both sides of the bar relating to the Confession of Faith. That argument treated of two separate matters which in my judgment must be separately considered.

The first is whether the respondents have not deposed the

Confession of Faith from its place of authority as a standard of the Church, and whether this of itself does not take them outside the trusts under which the property is held. The second and quite separate question is whether on one specific doctrine, namely, predestination, the new formulary is not contradictory of the Confession of Faith.

On the former of these questions my judgment is in favour of the appellants. First of all, I put aside any confusion which may arise from the substitution of the Westminster Confession for John Knox's Confession. It is with the Westminster Confession that we have to do, and it seems to me that if anything is certain, it is that the Free Church was pledged to the doctrine of the Westminster Confession as her doctrine and the doctrine of her office-bearers. Through all her history, and at every crisis of her history, assuming her identity with the historical Church of Scotland, she proclaimed this on the house-tops and in the most solemn and deliberate of her testimonies. Freed from State interference in 1843, she proceeded to fasten on herself the old obligations. Of her rights in judicial cases to construe the Confession of Faith there is no need to speak. But that the Confession of Faith is "the truths of God" was solemnly attested to be the personal belief of all who signed it. That this was found to be a hard yoke is credible, and has been asserted. Of the means at the command of the Free Church to alleviate this pressure I do not know. But what she has now done is to substitute a belief in "the doctrine of the Church as expressed in the Confession of Faith," and the general words in the first of the declarations adopted by the United Assembly on October 31, 1900, make it plain that the doctrine of the Church, as part of her constitution, is intended to be mutable. This places the Confession of Faith in a precarious instead of a stable position, and in my opinion this is an abandonment of an essential characteristic of the Free Church.

Such being my opinion on the more general question as to the Confession of Faith, I deem myself absolved from the necessity of entering on that one of its articles which has been separately discussed, namely, predestination.

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I am of opinion that in both cases the judgments ought to be reversed with costs.

LORD LINDLEY. My Lords, in the year 1900 the Free Church of Scotland (which the pursuers and appellants claim to represent) and the United Presbyterian Church united and formed the United Free Church of Scotland. Property previously held by trustees in trust for the Free Church was transferred to trustees in trust for the united body, i.e., the United Free Church; and the question raised by the first appeal is whether this transfer of property was or was not a breach of trust and invalid, although sanctioned by the General Assembly of the Free Church and by the great majority of the members thereof. The Court of Session decided this question against the pursuers, and they have appealed to your Lordships' House against this decision.

The second appeal relates to property conveyed to trustees for particular congregations of the Free Church, the trusts of which are fully set out in the model trust deed of 1844, which is one of the most important documents in the case. The question raised by the second appeal is whether the trusts declared by that deed are confined to members of the Free Church, represented by the appellants, or whether the trusts are wide enough to include all the members of the United Free Church formed in 1900. The Court of Session decided this question also against the appellants.

Both appeals are really based upon the ground that the union of the two Churches could not be legally effected consistently with the constitution and standards of the Free Church, and that consequently the transfer of the property of that Church to the United Free Church was a breach of trust and invalid; and that as regards the congregational property, the benefit of the trusts of the model trust deed can only be enjoyed by persons professing the doctrines which the appellants contend were the unalterable doctrines of the Free Church.

My Lords, the whole controversy turns on the powers of the General Assemblies of the Free Church. If they have no power to relax the fetters which the appellants contend bound

the Free Church hard and fast from its birth, then these appeals ought to succeed. But if, as the Courts in Scotland have held, the General Assemblies of the Free Church have power to do what they have done, then these appeals must fail. I propose, therefore, to confine my observations entirely to this one crucial question.

The circumstances which led to the secession of the founders of the Free Church from the Established Church and the views of the seceders are fully set out in the claim, declaration, and protest of May 30, 1842, and in the protest of May 18, 1843. These documents and the model trust deed framed on the basis of these documents in 1844 shew that whilst the seceders renounced all the benefits derived by the Established Church from its connection with the State, and shook off so far as they could all interference and control by the State, yet they clung tenaciously to the Holy Scriptures, the Westminster Confession, the two Catechisms, and the Second Book of Discipline, and regarded them as determining and regulating their doctrine, worship, discipline, and government. The government of the Church is declared to be in the hand of the Church officers, which means in the last resort the General Assembly. The powers of this body, as originally established, are to be found in the Westminster Confession and in the Second Book of Discipline; but the Free Church greatly enlarged these powers in 1843 and 1851, as will be seen presently. The claim, declaration, and protest above referred to treat the immunity of the General Assembly from all State control as a fundamental principle of the Church of Scotland; and the Free Church was formed in order to secure this immunity more completely than the Civil Courts had declared to be possible for members of the existing Established Church. Freedom from all State control in spiritual matters, as understood by Free Church men, is the raison d'être of the Free Church. The address to Her late Majesty (May 30, 1842), the Act of Separation and Deed of Demission by Ministers (May 23, 1843), and the Deed of Demission by Elders (May 30, 1843) which followed it all put this as the great object of the whole movement. At the same time the claims of the seceders

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are declared to be based on the constitution and standards of the Church of Scotland as heretofore understood; and in particular they considered it the duty of the State to promote religion as inculcated in the Westminster Confession and the other standards of the Established Church. By the expression "heretofore understood" I think is meant understood by the Church of Scotland unfettered by legislation and by legal decisions based upon it.

I must now invite your Lordships' attention to the powers of a General Assembly of the Church of Scotland, as declared in the Second Book of Discipline (1578), the Westminster Confession (1643, ratified by statute June 7, 1690), and the Barrier Act (1697).

The Second Book of Discipline is referred to in the claim, declaration, and protest of 1842 as one of the Church's authorized standards, and in the Act and Declaration of 1851 (which will be hereafter mentioned) as one of her earliest standards. It is a work of great authority. Speaking of Assemblies, it is laid down (Chapter VII., s. 8): "They have power also to abrogate and abolish all statutes and ordinances concerning ecclesiastical matters that are found noisome and unprofitable, and agree not with the time, or are abused by the people." This is a very large legislative power exercisable by General Assemblies of the whole Church, but not I should think by smaller assemblies, whose functions are more circumscribed.

The Westminster Confession is, next to the Holy Scriptures, the most authoritative document of all for members of the Scotch Church. It is plain from the language of this Confession that its framers laid no claim to infallibility for themselves and disclaimed infallibility for the Synods and Councils of the Church which should adopt that Confession (see Chapter XXXI., Article IV.). But although infallibility is denied them, great power is conferred upon them; for Synods and Councils are to determine controversies of faith and to make rules for public worship and government of the Church (see Chapter XXXI., Article III.). Their power is limited to ecclesiastical as distinguished from civil affairs (see Article V.). It is also declared in the Confession itself that the Holy Scriptures are the

foundation of the doctrine contained in the Confession, and are to be the foundation of the doctrines of the Church which adopts it (see Chapter I.). In all controversies of religion the Church is finally to appeal unto the Holy Scriptures (Chapter I., Article VIII.).

Chapters I. and XXXI., when read together, appear to me to confer upon Synods or Councils the power of interpreting the Holy Scriptures and the various articles of the Confession when controversies arise as to their meaning; and, as infallibility is disclaimed, it follows that an interpretation put by a Synod or Council on Scripture or the Confession is not binding for all time, but may be modified, or even rejected and be replaced, by another interpretation adopted by a later Synod or Council, and declared by it to be in its judgment the true meaning of the Scriptures or Confession upon the matter in controversy.

I take it to be clear that there is a condition implied in this as well as in other instruments which create powers, namely, that the powers shall be used bonâ fide for the purposes for which they are conferred. If, therefore, a Synod or Council, under colour of exercising their authority, were to destroy the Church which they were appointed to preserve, or were to abrogate the doctrines which they were appointed to maintain, their acts would be ultra vires and invalid in point of law; and it would be the duty of every Court in the United Kingdom so to hold if the question ever involved a controversy as to civil rights and so arose for judicial decision. For all persons who are members of the Church of Scotland its General Assembly is the highest Council of the Church, and it is difficult to limit the powers conferred upon it by the foregoing documents except by an appeal to the implied condition to which I have referred.

I cannot agree with those who contend that the powers of the General Assembly as declared in these documents are unlimited; but I am not able myself to define the limits of its authority more accurately than above stated. It is probably impossible to draw a sharp line clearly dividing all acts of a General Assembly which are within its power from acts which

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are beyond it. But it does not follow that it is impossible, or, indeed difficult, to decide in the great majority of cases whether a particular act is within its power or beyond it. Great as the powers are, they are limited by what can be found in the Scriptures. The Church must be a Christian Church and a Reformed Protestant Church. So far all is plain. I should, myself, think that it must be a Presbyterian Church. But this question is disputable and happily does not arise.

That very extensive but not accurately defined powers, both as to doctrine and government, are vested in a General Assembly of the Scottish Church is apparent from the Act of Assembly of 1697, commonly called the Barrier Act. Extensive but undefined power is there unmistakably assumed and recognised; no limit is set to it; but very important machinery is provided for its future exercise to prevent hasty decrees. In that respect the Act is a restrictive Act, for unless the prescribed machinery is adopted, an Act of Assembly cannot become a "binding rule and constitution of the Church." But the restriction only affects procedure; the wide powers of the General Assembly are not curtailed. This Act is, in my opinion, clearly applicable to the General Assemblies of the Free Church. It was included in what was adopted when that Church was created.

My Lords, if the case now before this House had to be decided on the documents to which I have already alluded, and without reference to any Acts of Parliament or other Acts of Assembly, I should hesitate long before I came to the conclusion that what the appellants mainly complain of was beyond the power of the General Assembly of the Free Church. Any interpretation of the Scripture or of the subordinate standards bonâ fide adopted by a General Assembly, and held by them better to express the doctrine intended to be expressed by the language used in the Confession itself, cannot, in my opinion, be treated as beyond their power, but is well within it.

But there are other documents which have to be considered, and especially the model trust deed, prepared in 1844 under the instructions of the General Assembly of the Free Church and formally approved and adopted by it in 1851. It is therein

recited that it was at all times an essential doctrine of the Church of Scotland that it should have a government in the hands of the Church officers, distinct from the civil magistrate or supreme power of the State, and that this government comprehends "the whole power of the Keys," which expression I understand includes those wide powers to which I have already referred in all matters touching the doctrine, worship, discipline, and government of the Church. Then it recites the secession from the Established Church and the formation of "the General Assembly of the Free Church of Scotland," and the claim of the Free Church to all the powers and privileges and the same internal government, jurisdiction, and discipline according to the true and original principles of the Church of Scotland before the separation. The model deed then gives a form of conveyance of property to trustees upon trust declared at great length, but which may be shortly summarized as trusts for the use as a place for religious worship by members of the Free Church. These trusts clearly contemplate the union of the Free Church with "other bodies of Christians as the said Free Church of Scotland may at any time hereafter associate with themselves," and provision is made for worship by such united bodies. The fourth trust is very important. It is to the effect that the trustees shall at all times be subject, in the management and control of the trust property, and in all matters and things connected therewith, to the regulation and direction of the General Assembly for the time being of the said body or united body of Christians. Provision is made for the event of a secession from the Church which will be found in the ninth trust.

These trusts are confined to the congregational property which is the subject of the second appeal; but no one suggests that as regards the constitution of the Free Church and the powers of the General Assembly there is any difference between one set of members and another. In my opinion the model trust deed emphasizes and makes plain much that is obscure when the subordinate standards alone are looked at, especially when the legislation affecting them is borne in mind.

In the year 1844 trustees were appointed to hold any property

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which might be bequeathed or conveyed to them for the Free Church, and also such places of worship as might be erected on sites granted to trustees nominated by the General Assembly, and also such other places of worship as persons might wish to convey to them on the terms of the model trust deed. A fresh appointment was made in 1871.

I pass on to consider what was done as regards the union of the Free Church with the United Presbyterian Church. Union with other Presbyterian Churches was apparently desired some fifty years ago; but in order to effect union with the United Presbyterians several arrangements of importance had to be made, particularly with reference to the mutual eligibility of the ministers and other officers of the two bodies to Church offices, and to adjustment of the different views held by the two Churches respecting predestination and respecting their relation to the State, and the duties of the State as regards religion. It took many years to settle these preliminary matters. In 1892 the General Assembly of the Free Church passed "The Declaratory Act anent Confession of Faith"; and although a small minority of members protested against it, I am quite unable to discover any valid ground for holding this Act to be one which a General Assembly of the Free Church had no power to pass. It no doubt relaxes the excessive stringency of certain articles of the Westminster Confession, if construed literally; but it imposes no new fetters, and in relaxing the old ones, and so rendering them more acceptable to many earnest Presbyterians desirous of remaining in the Church or becoming members of it, the General Assembly were honestly attempting to preserve the Free Church and its fundamental doctrines, and, in my opinion, there is no pretence for saying that they were false to their trust and were endeavouring to destroy any doctrines which it was their duty to preserve.

My Lords, I can understand that an ordinary member of the Free Church brought up from childhood to regard the Confession as an inspired document to be construed literally and in the same sense for all time may think some of the doctrines set forth in this Act unorthodox; but that is not the question on which this appeal turns. The question is whether it is

competent for the governing body of that Church, i.e., the General Assembly, complying with the conditions of the Barrier Act, to declare that the Confession, properly understood, does not require absolute uniformity of belief on the matters dealt with by the Declaratory Act. This is the great question at issue between the parties to this appeal, and I have come to the clear opinion that on this question the appellants are wrong. I come to this conclusion after a careful examination of the powers of the General Assembly as contained in the documents before referred to. These powers are, in my opinion, as fundamental in the constitution of the Free Church of Scotland, and as essential to its preservation, as any of the doctrines in the Confession or other subordinate standards.

The appellants made a great point of the alteration made by this Declaratory Act in the fundamental doctrine of the Free Church respecting the principle of Establishment, by which I understand is meant the duty of the State to promote religion, and especially the Presbyterian religion, as set forth in the Westminster Confession, and sanctioned by Parliament as already mentioned. Chapter XXIII., Article III., of the Confession declares what in the view of the Church of Scotland is the duty of the State. Its language is very general, and leaves the State to determine in what manner it will perform such duty. Some, at all events, of the founders of the Free Church attached great importance to this principle of Establishment which was not held by all Scotch Presbyterian Churches. But it does not follow that this principle was to be tenaciously adhered to for all time, and that no future General Assembly should have power to modify or relax it if owing to changes of opinion or other circumstances the General Assembly of the Free Church deliberately came to the conclusion that the preservation and healthy growth of the Free Church required the principle to be reconsidered.

I cannot come to the conclusion that the view taken in 1843 of the duty of the State was a fundamental doctrine admitting of no explanation or modification. Dr. Chalmers' address adopted by the Free Church shews that he and its then members would have strenuously opposed the change made, but it does

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not follow that he or they would have denied the power of a future General Assembly to make such change after due deliberation.

As I understand the matter, the Free Church can and does fulfil all her spiritual functions without any State aid, and the attempt to obtain aid from the State, whilst repudiating all State control, has proved a failure. This doctrine as to the duty of the State whether best described as a political or a religious doctrine is a doctrine which the General Assembly could, in my opinion, repeal or modify as might be expedient.

In 1900 the Act uniting the two Churches was passed by the Free Church of Scotland after complying with all the conditions of the Barrier Act. The Act was dated October 31, 1900, and the two Churches were then formed into one under the name of the United Free Church of Scotland, and its supreme governing body was designated the General Assembly of the United Free Church of Scotland. Having regard to the constitution of the Free Church, I cannot agree that this union could only be legally valid if assented to by all the members of the Free Church.

As part of this transaction the property held for the Free Church by its trustees was ordered to be conveyed to a new body of trustees for the United Free Church, and this was done; but a dissentient minority protested.

This transfer is complained of by the pursuers and is sought to be set aside. But having regard to the trusts on which the property of the Free Church was held, and to the powers of its General Assembly, the pursuers have, in my opinion, completely failed to prove any breach of trust or misapplication of the property of the Church. The United Free Church is the Free Church lawfully enlarged; the individuals entitled to the use and enjoyment of the Church property are lawfully more numerous than before. The pursuers in the first appeal have not been unlawfully excluded from such use and enjoyment. There is no evidence that any person has been deprived of the use and enjoyment of any property held in trust for the Free Church or the United Free Church, or any congregation of either, except a few ministers represented by the appellants in

the second appeal who repudiate the authority of the General Assembly of the Free Church to make the changes complained of, and who by their own conduct have deprived themselves of their right to the benefit of the trusts on which such property is held. Both appeals are based on the erroneous view that the Free Church had no freedom, but that it was bound hard and fast to certain doctrines expressed in language admitting for all time of only one meaning. I am quite unable so to regard it. The struggle for liberty was not so abortive as that.

In the course of the argument many statutes and decisions were referred to. Those which related to conflicts with the Established Church of Scotland are not so important for the present purpose as those which relate to disputes between members of non-established Churches. The decisions relating to the Established Church (namely, the *Auchterarder Case* (1) and other Scotch cases referred to in argument) would be all-important if your Lordships had to consider the validity of acts done by the General Assembly of the Established Church of Scotland; for that Church is governed not only by the Westminster Confession and Acts of Assembly, but also by statutory enactments which make reform in her doctrines, worship, discipline, and government difficult, if not impossible without legislation. But the Free Church is emancipated from these fetters.

As formed in 1843 the Free Church was purely a voluntary religious association, both Christian and Protestant, and believed by its founders to be divinely instituted, professing doctrines based on the Scriptures and the old subordinate standards, governing itself by certain rules, and providing a representative assembly of its own for explaining its doctrines and for preserving the association by making such changes in its worship, discipline, and government as might be found expedient after consulting the whole body as required by the Barrier Act. A trust for the Free Church is in my opinion a trust for such persons as shall hold the doctrines and submit in ecclesiastical matters to the government and discipline

(1) 2 Robert. 25. (Special report.)

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adopted by the founders of the Free Church, with such modifications as may be made from time to time by the General Assembly of that Church, provided the conditions required by the Barrier Act are observed, and provided the Church is preserved as a Reformed Church with Presbyterian government.

There is no statutory or other law which makes such an association illegal or which compels it to accept the Westminster Confession, whether with or without modification. The founders of the Free Church did accept it, but only subject to the powers which they insisted were vested in the General Assembly of that Church. So long, therefore, as the General Assembly does not exceed those powers, or act contrary to some statutory or other law of Scotland, or commit any breach of trust as above explained, it is not the function of any civil Court to interfere with it. This I regard as settled by the decision of your Lordships' House in *Craigdallie* v. *Aikman* (1), *Forbes* v. *Eden* (2), and is in entire accordance with the general law of trusts applicable to such associations as the Free Church: see *Attorney-General* v. *Pearson* (3); *Milligan* v. *Mitchell* (4); *Long* v. *Bishop of Cape Town.* (5)

The distinction between an erroneous decision by a body having jurisdiction to deal with a particular subject-matter, and a decision by a body having no jurisdiction over the matter decided, is familiar to all lawyers, and must be steadily borne in mind in this case. In passing the Declaratory Act in 1892 and the Act of Union of 1900 I can discover nothing ultra vires or contrary to any law. Still less can I discover anything ultra vires or contrary to law in the interpretation put by the General Assembly of the Free Church on some of the articles in the Westminster Confession, or in the alterations made in the declarations and forms to be made and signed by the ministers and officers of the Church. It follows that, in my opinion, the transfer of property which is complained of (and which was simply consequential on the Acts

(1) 1 Dow, 1, 16.
(2) L. R. 1 H. L., Sc. 568.
(3) (1817) 3 Mer. 353; 17 R. R. 100.
(4) (1837) 3 My. & Cr. 72; 45 R. R. 218.
(5) (1863) 1 Moo. P. C. (N.S.) 411, 461.

of Assembly of 1892 and 1900) was neither ultra vires nor contrary to any law, and cannot therefore be successfully impeached.

The foregoing observations apply to both appeals; but the second appeal appears to me to present less difficulty than the first. I regret that any ministers should have been excluded from their offices; but the trusts declared by the model trust deed are clear and explicit, and their validity cannot be questioned by those who have no title to the property to which it applies except under the provisions of that deed. There has been no breach of the trusts declared by the model trust deed.

My Lords, I might have contented myself with saying that I concurred in the decision of the Court of Session; but the question between the parties is of such great importance, and its solution requires a careful study of so many documents, statutes, and decisions, that I considered I should not be adequately discharging my duty to this House if I did not set forth, as clearly as I could, the reasons which have induced me to give my voice for the dismissal of both appeals with costs.

LORD ALVERSTONE. My Lords, inasmuch as I am differing in a Scottish appeal from the judgment of the Lord Ordinary, affirmed unanimously by the Second Division of the Court of Session, I think it only right that I should state my reasons for the judgment which I am about to give.

The question raised by these appeals is whether funds invested in the names of trustees, and real property held on trust for behoof of the Free Church of Scotland, have been dealt with in a way which constitutes a breach of trust. Both classes of property are now being applied, or it is proposed to apply them, for the purposes of the United Free Church, being a body of Christians formed by a union, or attempted union, of a great majority of the ministers and elders of the Free Church of Scotland with the ministers and elders of the United Presbyterian Church of Scotland, and the point to be decided is whether, having regard to the purposes for which the money and property were originally subscribed, given,

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bequeathed, or conveyed, such application constitutes a breach of trust.

The union, or attempted union, was assented to and approved of by a very large majority of the ministers and elders and congregations of the Free Church; the actual numbers are not material, but, as I understand, all except some thirty of the ministers approved of the proposed union; but the dissenting minority represent a very considerable body of adherents to congregations of the Free Church who do not approve of, and some of whom have protested against, the proposed union.

The law applicable to funds which have been given for the purpose of a voluntary association such as the Free Church is well settled, and it is not necessary for me to do more than refer to the decision of your Lordships' House in *Craigdallie* v. *Aikman* (1) to shew that such funds, in the absence of express provision, must be applied for the benefit of those who adhere to the original principles of the founders. If the terms of the foundation of the trust provide for the case of schism the Courts will give effect to them, but if there be no such provision, the cestuis que trust are those who adhere to the fundamental principles upon which the association was founded.

The Free Church of Scotland was formed in the year 1843 by what is called "the Disruption," or, in other words, the secession from the Established Church of Scotland of a large body of the ministers of the Established Church, who renounced entirely the pecuniary benefits of their connection with the establishment in maintenance of a protest which they had made against the interference by the civil Courts with rights which they considered to be the rights of the Church.

It is not necessary to trace the history of the Established Church down to 1843, or the history of the various secessions which had taken place before that date, but it is sufficient to say that those who founded the Free Church separated from the Established Church, not upon any question of doctrine, but solely upon the ground which I have just mentioned, and which ground is in no way inconsistent with the principle of Establishment.

(1) 1 Dow, 1, 16.

The United Presbyterian Church was not then in existence; it was formed in the year 1847 by the union of two Churches which had separated from the Established Church many years before, and were known as the United Associated Synod and the Relief Church.

It is necessary to consider carefully what was the constitution of the Free Church in so far as it throws light upon the question raised for your Lordships' decision, namely, what were the trusts upon which the property in dispute in this action was held?

The first, and in fact the most important, question which arises on this part of the case may be stated as follows. It is maintained by the appellants and denied by the respondents, that the principle of Church Establishment was adopted as a fundamental or essential principle of the Free Church of Scotland; and that its founders made that principle one of the main grounds for refusing to join other existing voluntary Churches. It cannot, I think, be doubted that this principle was regarded as being fundamental by the founders of the Free Church, and was put forward as one of the main inducements in the appeals for pecuniary aid, in response to which a very large proportion of the funds and property now held in trust for behoof of the Free Church was given. Upon this part of the case I might content myself with adopting the view which is expressed by the Lord Ordinary, and by more than one of the judges of the Court of Session. Lord Low, in his judgment (1), expressed himself as follows: "There is no doubt that the founders of the Free Church, when they left the Established Church in 1843, did so, declaring that they adhered to the principle of an Established Church, and that they seceded only because as the law then stood the Church did not possess that independence, in what they regarded as matters spiritual, which in their view was essential in order to give effect to the cardinal doctrine of the Headship of Christ." And later on: "The Establishment principle (to use a convenient short phrase) was one which was regarded as of great importance by the Free Church at the

(1) 4 F. at p. 1093.

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commencement of its history, and naturally so, because, in the first place, it justified the action of those who had seceded by proclaiming that they were not schismatics, and, in the second place, the founders of the Church hoped that a change in the law might be effected which would enable them to return to the Establishment." And Lord Trayner says, in even more emphatic language (1): "The Free Church, from its constitution in 1843 down (at least) to its union with the United Presbyterian Church, professed the Establishment principle." And: "It was the feature of the Free Church (prior to the union) which distinguished it from all other Presbyterian Churches in Scotland, that it was the only Presbyterian Church not connected with the State which professed to hold the Establishment principle."

I am aware their Lordships in other parts of their judgments expressed the view that the principle either cannot be regarded as fundamental, or was one from which the General Assembly of the Free Church had power to depart; but I refer to these passages at present only for the purpose of shewing that, having regard to the views held by the founders of the Free Church with reference to the Establishment, their union with the two then existing Churches, which subsequently united to form the United Presbyterian Church, would not at that date, 1843, have been possible.

In view, however, of the great importance of the question, and inasmuch as opinions have been expressed that the principle of Establishment cannot be regarded as fundamental, I think it right, as briefly as possible, to examine the question for myself, and to state the reasons which have led me to the conclusion that it was regarded as a fundamental and essential principle of the Free Church at its foundation, for very many years afterwards, and, as I think, down to the time of the union with the United Presbyterian Church in 1900. Reliance was placed by the appellants upon the language of Article III. of Chapter XXIII. of the Westminster Confession, which is as follows: "The civil magistrate may not assume to himself the administration of the Word and Sacraments or of the

(1) 4 F. at p. 1113.

power of the Keys of the Kingdom of Heaven: yet he hath authority, and it is his duty to take order that unity and peace be preserved in the Church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered and observed. For the better effecting whereof he hath power to call Synods, to be present at them, and to provide that whatsoever is transacted in them be according to the mind of God." (1)

It was strongly urged by the respondents that that article does not enunciate the principle of Establishment or Endowment. As regards Endowment the observation is probably well founded, but even taking the article by itself, in my opinion it distinctly embodies the principle of Establishment. Whether this be so or not is not very material upon the point of view which I am at present considering; the more important question is, How was it regarded by the founders of the Free Church?

The first important document is that of May 30, 1842. This was a claim, declaration, and protest made by then ministers of the Established Church before their secession; it is therefore not to be expected that the references to Establishment would be very distinct, but a passage (2) occurs which has not been quoted, and which is in the following words: "And whereas this Church, highly valuing as she has ever done her connection on the terms contained in the statutes hereinbefore recited with the State, and her possession of the temporal benefits thereby secured to her for the advantage of the people, must nevertheless, even at the risk and hazard of the loss of that connection and of these public benefits—deeply as she would deplore and deprecate such a result for herself and the nation—persevere."

This passage of the declaration which follows, and the concluding words of the Protest (3), shew that even in a document in which a claim was being made by members of an

(1) See Appx. E, p. 733. (2) See Appx. G, p. 737.
(3) See Appx. G, p. 741.

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Established Church to spiritual independence they thought it right to point out the importance which the signatories attached to the principle of Establishment. The principle is, moreover, emphatically enunciated in the document entitled, "The Protest of the Commissioners to the General Assembly, on the 18th May, 1843." (1) This being the first Assembly of the then newly-formed Free Church, the words are of such importance that I think it right to quote them: "And finally while firmly asserting the right and duty of the civil magistrate to maintain and support an establishment of religion in accordance with God's Word, and reserving to ourselves and our successors to strive by all lawful means as opportunity shall, in God's good providence be offered, to secure the performance of this duty agreeably to the Scriptures and in implement of the statutes of the Kingdom of Scotland and the obligations of the Treaty of Union as understood by us and our ancestors, but acknowledging that we do not hold ourselves at liberty to retain the benefits of the Establishment while we cannot comply with the conditions now to be deemed thereto attached."

It is, in my opinion, significant and to be borne in mind, that this protest was one of the first official acts of the Free Church. As far as I know, there is no document or evidence which suggest that there was at the time of which I am speaking, namely, the year 1843, any doubt or difference of opinion as to that which was understood by the expression the Establishment principle; but it is sufficient for my purpose to quote two passages from the Pastoral Address of May 30, 1843 (2), which was embodied in an Act of the Assembly of the Free Church, and to which the ministers were directed to call the attention of their people on June 15, 1843. These passages from that address state the principle as follows: "It was ever held by the Established Church indeed that the Church and the State being equally ordinances of God, and having certain common objects connected with His glory and the social welfare, might and ought to unite in a joint acknowledgment of Christ, and in the employment of the means and resources belonging to them respectively for the advancement of His

(1) See Appx. G, p. 741. (2) Ante, p. 530.

cause." And later: "So upon the other hand the State held directly and exclusively from God, and was entitled and bound to exercise under its responsibility to Him alone its entire secular sovereignty, including therein whatever it was competent for or binding upon the State to do about sacred things or in relation to the Church, as, for example, endowing and establishing the Church and fixing the terms and conditions of that establishment."

These passages shew clearly what was understood by the founders of the Free Church as the Establishment principle.

I will not quote again the passage from Dr. Chalmers' speech in 1843, to which such frequent reference was made, but it is impossible to read it without being satisfied that he at least made the principle of Establishment one of the fundamental principles of the Free Church, and that his view was adopted unanimously by the Assembly on May 20, who directed that an account of the proceedings of the previous meeting should be sent to the ministers and friends, which account should contain Dr. Chalmers' address as Moderator. It should be noted in passing that the protest of May 18, 1843, was directed to be recorded at the commencement of the presbytery books, and I have not the slightest doubt that those documents to which I have referred were regarded by the ministers and members of the Church as formulating the essential principles upon which the Free Church was founded. It was a time of great excitement, and the attention of the Free Church ministers and their congregations and friends throughout the country would be closely directed to these important documents, and I doubt not that every line would be closely criticized and considered.

There is, moreover, a remarkable confirmation of this view in the language used in reply to the addresses received from other Congregational Churches in other parts of the kingdom in the year 1843. I need scarcely point out that in replying to such addresses the elders of the Free Church would have no object in criticizing, still less in traversing. any opinions which had been expressed in addresses of a friendly character transmitted to them, and this gives greater force to the language

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used in reply to such addresses, of which I would cite the two passages set out in the documents before us: "But you misapprehend the nature of the movement which we have made in supposing that we have in the least degree altered our views respecting the lawfulness and the desirableness of a right connection between Church and State" (Printed Papers, Appendix D, p. 21). "History and experience have convinced us that there is a form of alliance which is at once practicable and agreeable to Scripture and highly beneficial. We have renounced the temporal advantages of the Scottish Ecclesiastical Establishment, not in consequence of any alteration in our views on this subject, but because the Civil Courts had violated our constitution; and Parliament, under the guidance of an infatuated Government, had sanctioned that violation" (Appendix D, p. 25).

I pause here to notice an argument strongly urged before us on behalf of the respondents, and which appears to have had weight with the Lord Ordinary and the judges of the Second Division, namely, that the passages in the documents leading up to the foundation of the Free Church, and in the preamble to the Act of 1846, to which I shall refer, were parenthetical and related to the action of third persons, namely, the civil magistrates, and not of the Church itself. So far from weakening the force of the declaration, couched in the terms in which it is, the fact, in my opinion, gives it additional weight. The separation was in no way promoted because the dissenting ministers objected to the principle of Establishment; that principle was not attacked by the claims of the Courts against which they had protested, and yet its recognition is considered of such great importance as to receive the prominent notice which I have quoted. Then with reference to the argument that it relates to the action of third parties, also strongly pressed upon us, I am unable to see how such an argument assists the respondents. It seems to me also to give additional weight to the firm assertion of the right and duty of Churches to support the State in the performance of its duty towards religion by the medium and through the agency of an Established Church, which assertion the protesting ministers were making.

It seems to me, moreover, that a brief consideration of the Establishment principle as contrasted with the principle of Disestablishment is sufficient to shew its fundamental or essential character. The one seeks to enforce the paramount duty of the State in its official capacity to recognise religion, to maintain and support the Church; the other desires to see all connection between the State and the Church broken down and destroyed, and to prevent the State from exercising any control whatever over the Church in any capacity, and, of course, from endowing or assisting to maintain a church; and if, as I shall point out later, the United Presbyterian Church certainly considered any civil establishment of religion unscriptural and unjust, it is difficult to understand how such a distinction between the views held by two Churches can be regarded as otherwise than fundamental and essential.

Nor does it seem to me that the suggestion made by Lord Trayner that the different view taken on this question by the Free Church and the United Presbyterian is a matter of polity and not a matter of faith makes any substantial difference. In one sense the questions on which the Free Church separated from the Establishment were not matters of faith, but, in my opinion, the difference between the Free Church and the United Presbyterian was a difference, not on a mere matter of detail, but upon a fundamental principle.

For these reasons I have arrived at the conclusion that the founders of the Free Church regarded the Establishment principle, not only as one of the very greatest importance, but as fundamental and essential, and that at that date union between the Free Church and either of the Churches subsequently forming the United Presbyterian Church would have been out of the question.

If I am right in this view, its bearing on the question raised before us is of the greatest importance. It cannot, in my opinion, be questioned that the documents to which I have referred and the principles which they embody were the documents upon the basis of which the donors of a very large proportion of the trust funds, the application of which is in question in this case, made their gifts and donations, and upon

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the faith of which also the real property in question was conveyed.

This conclusion leads me to consider whether the history of the Free Church since 1843 and events since that date support the view that that property held for its behoof may without breach of trust be applied for the purposes of a Church which supports the principle of Disestablishment. I pass, therefore, to consider briefly the history of the Free Church upon this point from 1843 to 1900.

In the year 1846 we find the Church thinking it right to declare that she "firmly maintains the same scriptural principles as to the duties of nations and their rulers in reference to true religion and the Church of Christ for which she has hitherto contended." I regard this as a distinct recognition of the Establishment principle, and in no way weakened by the words following, which disclaim intolerant or persecuting principles. Five years later—in the year 1851—in a formal Act and Declaration of the Assembly the principle of Establishment is again recognised as of the highest importance; the words used are: "Holding firmly to the last as she holds still, and through God's grace will ever hold, that it is the duty of civil rulers to recognise the truth of God according to His Word, and to promote and support the Kingdom of Christ without assuming any jurisdiction in it or any power over it, and deeply sensible, moreover, of the advantages resulting to the community at large, and especially to its most destitute portions, from the public endowment of pastoral charges among them."

Again, in the year 1853, the Church, in emphatic language, reaffirms the principle, calling special attention to that of Establishment: "That this Church maintains unaltered and uncompromised the principles set forth in the claim, declaration, and protest of 1842, and the protest of 1843, relative to the lawfulness and obligation of a Scriptural alliance between the Church of Christ and the State, and the conditions upon which such an alliance ought to be regulated."

In the year 1864, when the question of union between the Free Church and the United Presbyterian Church was actually

under discussion, the committee of the Free Church stated, as one of its distinctive principles, that, as an act of homage to Christ, it is the duty of the civil magistrate, when necessary or expedient, to employ the national resources in aid of the Church; and again, in the year 1867, the principle is enunciated in even stronger language: "As an act of national homage to Christ the civil magistrate ought, when necessary and expedient, to afford aid from the national resources to the cause of Christ, provided always that in doing so, while reserving full control over his own gift, he abstain from all authoritative interference in the internal government of the Church."

Later, in the year 1873, when dealing with the question of eligibility of ministers, the General Assembly declared that it adhered to the great fundamental principle of the Church under two heads, the second of which was as follows: "Secondly, the prerogative of the Lord Jesus Christ as Head over all things to his Church, and supreme over nations and their rulers, who are consequently bound collectively and officially as well as individually and personally to own and honour His authority to further the interests of His holy religion."

These passages from the proceedings of the Free Church satisfy me that for a period of thirty years after the Free Church was founded the Establishment principle was regarded as fundamental, and I doubt not that during that period, and in reliance on that principle, a considerable part of the property in question was given and conveyed to trustees for behoof of the Free Church.

It was suggested by the respondents that the union of the Free Church with the Church known as the United Original Seceders in the year 1852, and with the Reformed Presbyterian Church in 1876, afforded arguments in support of the union with the United Presbyterian in the year 1900. I am wholly unable to follow that argument. I do not propose to trace the history of the two Churches with which the Free Church united beyond saying that, as far as I can gather from the papers, the Free Church, in uniting with them, in no way abandoned or altered any one of the principles which it had

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professed in the year 1843, but, on the contrary, both the united Churches represented that they were in complete sympathy with the Free Church. As regards the United Original Seceders, it is only necessary to examine the representation and appeal made by the Synod of that Church in the year 1852 to see that their union with the Free Church was based upon and only consistent with the view that the Free Church still maintained the Establishment principle. In the case of the Reformed Presbyterian Church the statement in the Act of Union that the United Churches accept the preamble to Article XII. of the Free Church Assembly, 1846, which I have already cited, proves, in my opinion, that the maintenance of the Establishment principle was the basis of union between the Free Church and the Reformed Presbyterian.

The action of the Free Church in the years 1892 and 1894, though it must be considered in connection with the question of the powers of the General Assembly, has, in my opinion, very little, if any, bearing upon the point which I am at present discussing. In the first place, these acts were objected to; but I would point out that although the Act of 1892, which is undoubtedly of great importance upon the second branch of the case, has no direct bearing upon the question of Establishment, one of the main grounds of objection and protest was stated in the following terms (Appendix A, p. 134): "Because under the head which refers to intolerant and persecuting principles which is to take the place of the present preamble to the formula, all reference to the duties of nations and their rulers to true religion and the Church of Christ as therein set forth is wholly omitted."

It now becomes necessary to consider the position of the United Presbyterian Church in reference to the Establishment principle. The possibility of a union of the Free Church with other bodies of Christians was undoubtedly contemplated by its founders: two such unions have in fact taken place; it becomes therefore of importance to consider whether or not the United Presbyterian Church was a Church with which the Free Church could properly unite, and whether it would be a breach of trust to apply funds held in trust for behoof of the Free Church as

originally constituted to the purposes of the united body, now the United Free Church. In my opinion this matter does not admit of serious doubt. I am aware it was argued by the respondents that the United Presbyterian Church between the years 1847 and 1900 might, without breach of trust, have united with the Establishment, or applied its funds in aid of Establishment, and it was contended by Mr. Haldane that the United Free Church could do so without impropriety. Without referring to all the documents which, I think, negative this contention, I would call attention to the view held by the United Presbyterian Church, as stated in the report of 1864, which seems to me to be wholly inconsistent with the argument: "That inasmuch as the civil magistrate has no authority in spiritual things, and as the employment of force in such matters is opposed to the spirit and precepts of Christianity, it is not within his province to legislate as to what is true in religion; to prescribe a creed or form of worship to his subjects, or to endow the Church from national resources; that Jesus Christ as sole King and Head of His Church has enjoined upon His people to provide for maintaining and extending it by free-will offerings, and this being Christ's ordinance it excludes State aid for these purposes; and that adherence to it is the true safeguard of the Church's independence." (1) And again in 1867: "That it is not competent to the civil magistrate to give legislative sanction to any creed in the way of setting up a civil establishment of religion, nor is it within his province to provide for the expense of the ministrations of religion out of the national resources, that Jesus Christ as sole King and Head of His Church has enjoined upon His people to provide for maintaining and extending it by free-will offerings; that this being the ordinance of Christ it excludes State aid for these purposes, and that adherence to it is the true safeguard of the Church's independence. Moreover, though uniformity of opinion with respect to civil establishments of religion is not a term of communion in the United Presbyterian Church, yet the views on this subject held and universally acted upon are opposed to these institutions." (2)

(1) See Appx. L, p. 755. (2) Ante, p. 539.

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Further, I am wholly unable to reconcile this argument with the statement proved in evidence, and published in 1897 on behalf of the United Presbyterian Church. In that year a tract, No. XXV., prepared by the committee of the United Presbyterian Church on the disestablishment and disendowment of the Established Churches of England and Scotland, was issued by the United Presbyterian Church and sent to all the ministers of the Free and Established Churches. In that tract not only is it stated that the United Presbyterian Church maintains as one of its most distinctive principles that it is not the province of the State to establish and endow the Christian Church, but that civil establishments of religion are unscriptural and unjust. In the face of these documents it seems to me impossible to adopt the contention of the respondents; but here, again, I should be justified in relying upon the opinion of their Lordships in the Scotch Court. In the course of his judgment Lord Low said (Appendix D, p. 58): "On the other hand it seems to me to be equally certain that the United Presbyterian Church never read the Confession of Faith as laying down that it is the right and duty of the civil magistrate to maintain and support an Established Church. There does not appear to be any material difference between the two Churches upon the point so far as their standards are concerned, but the view of the United Presbyterian Church as a whole has always been that it is not within the province of the civil magistrate to endow the Church out of public funds, and that the Church ought not to accept State aid, but ought to be maintained by the free-will offerings of its members." Lord Trayner, moreover, states in emphatic terms that the United Presbyterian Church had, throughout the whole period of its existence, repudiated the Establishment principle.

With reference to the attitude of the United Free Church, and the possibility of its adopting a different view, the statements in the resolutions of the Assembly of the United Free Church, passed in the years 1901 and 1902, to the effect that the Establishment was objectionable on principle, and recording its testimony in favour of disestablishment of the Established

Church of Scotland, which statements were not attempted to be qualified by the counsel for the respondents, are, in my opinion, conclusive against any such contention.

The only argument on this point remaining to be noticed is that which was founded upon the documents agreed to by the Assembly of the Free Church and the Synod of the United Presbyterian Church at the time of union.

These documents transfer and convey all the property and funds of the Free Church of Scotland to the united body; but it was said that the modified forms of questions formulated by the General Assembly of the United Free Church in the year 1900 were not inconsistent with the principle of Establishment, in so far as that was a fundamental principle of the Free Church, and that office-bearers were left free to hold their own individual views on this question.

If I am right in the view which I have endeavoured to express, that the principle of Establishment was regarded by the founders of the Free Church as a fundamental principle of that Church, and was so maintained for a period of more than thirty years after its foundation, the fact that the Free Church of Scotland, in uniting with a Church pledged to disestablishment principles, and regarding civil establishments of religion as unscriptural and unjust, had agreed to treat the matter as an open question, seems to me entirely beside the mark for the purposes of the present discussion. The respondents must justify not only a nominal union, but the claim to apply the trust funds to the purpose of the united body, and to dispossess, as they have attempted to do, the Free Church ministers who have declined to join the United Free Church from the possession of their manses and churches. Unless the respondents can make good their point that the application of the moneys for the purpose of the united body does not amount to a breach of trust, the fact that they agreed for the purpose of the union not to raise any question cannot afford a justification.

The only remaining point which requires notice upon this part of the case is the argument that the terms of the model trust deed, which was settled by a committee of the Free

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Church and approved by the Assembly in 1844, justifies the transfer of the property to the united body. This argument is based mainly upon the first and fourth trusts, and incidentally upon the ninth trust. The object of this trust deed was undoubtedly to ensure that the property should be held for the purposes of the Free Church as originally constituted. It proceeds upon a general outline of the history of the Established Church, the disruption, and the subsequent formation of the Free Church. The first trust was, in my opinion, a provision not unnatural from a conveyancing point of view, that the trust should not cease in the event of the Free Church of Scotland uniting with themselves other bodies of Christians. It would in my judgment be contrary to every rule of law applicable to such a case to hold that it gave the Assembly of the Free Church power by mere union to divert the funds to a body which did not conform to the fundamental principles of the Free Church. Still less can the respondents rely upon the fourth trust, which was the natural sequence of the recital (Appendix A, pp. 66 and 67), as to the continuation of the form of Church government by Kirk Sessions, Presbyteries, Provincial Synods, and General Assemblies, and bestowed upon the General Assembly of the Free Church the same powers as those which had been enjoyed and claimed by the Assembly of the Established Church. The ninth clause not only affords no argument for the respondents, but incidentally supports the contention of the appellants. The majority who consented to the union with the United Presbyterian Church did not purport to carry out the object of the protest of May 18, 1843, more faithfully than the appellants who are the minority. Clause 9 only contemplates an apportionment or division in the event of a section not less than one-third of the whole of the ordained ministers claiming to be carrying out the objects of the protest more faithfully than the others. In my opinion, this accentuates the extreme importance attached by the Church at its foundation to the protest of May 18, 1843, and would make it entirely ultra vires of a section of ministers, purporting to act under the ninth trust, to disregard the assertion of right and duty therein made,

and to claim under this clause to associate itself with a body which was openly promoting disestablishment.

It is contended by the respondents—and this is really the foundation of the judgment of Lord Young—that the General Assembly had power to legislate in such matters, and to abandon the Establishment principle, even though and notwithstanding that it may have been one of the fundamental principles of the Free Church. This question has a bearing upon the second ground relied upon by the appellants, namely, that the Assembly of the Free Church had departed from the Westminster Confession and the standard of the Church, and had made changes in doctrine inconsistent with the fundamental principles of the Free Church. The powers of the Assembly of the Free Church were, in my opinion, no greater in relation to the fundamental principles upon which that Church was founded than were the powers of the Assembly of the Established Church. If I am right in the view which I have ventured to express, that paragraph 3 of Article XXIII. of the Westminster Confession, and the documents to which I have referred as shewing the fundamental principles upon which the Free Church was founded, did make—to adopt once more the language of the Act of 1873—the Establishment principle one of the great fundamental principles of the Church, I am wholly at a loss to understand upon what ground it can be said that the Assembly either of the Established Church or of the Free Church had the right to permit its ministers and elders to depart from that principle. I agree that the Barrier Act, upon which so much reliance was placed by the respondents, though it confers no new powers, recognises that the General Assembly possesses some powers of alteration with reference to doctrine, worship, discipline, and government, but such powers do not, in my opinion, include a power to subvert or destroy fundamental and essential principles of the Church.

I have now to say a few words upon the second point upon which reliance was placed by the appellants, to the effect that the Free Church, by its Acts of 1892 and 1894, and the Assembly of the United Free Church by their Acts of October, 1900, with reference to the questions and formulæ

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to be used in the ordination and induction of ministers and office-bearers, have departed from the fundamental principle of the Free Church in the matter of doctrine, and particularly in relation to the doctrine of predestination and free will as set forth in the Westminster Confession.

For reasons which I will briefly state, had this been the only ground upon which exception could be taken to the action of the Assembly of the Free Church, I am not at present satisfied that it has acted in excess of its powers.

I do not wish to express a final opinion, as I do not consider it necessary for the purpose of determining the legal rights of the parties to these appeals; and further consideration might satisfy me that the objection by the appellants that the Assemblies of the Free Church and the United Free Church have released their ministers and office-bearers from adherence to the Westminster Confession, as such, has more weight than I am at present disposed to attach to it. On the other hand, the argument of the Dean of Faculty and Mr. Haldane satisfied me that there are passages in the Westminster Confession and in other standards of the Church which might require such explanation and exposition as would fairly come within the words used in the Barrier Act, "alteration in doctrine." I do not feel myself competent, at any rate upon the information at present before me, to express any final opinion upon such a point, and I do not therefore propose to base my judgment upon the second ground which was urged before us on behalf of the appellants.

It only remains to consider the position of the appellants and their rights as a minority of the ministers and elders of the Free Church representing congregations or portions of congregations who are not prepared to join the United Free Church. It is not contended that they have changed their principles; it is not suggested that they have departed from any fundamental or essential principle of the Free Church; it is not alleged that they are not faithfully carrying out the objects of the protest of May 18, 1843. The respondents are threatening to attempt to eject them from their churches and manses, and to deprive them of any right to participate in any funds of the

Church, simply on the ground that they decline to become members of the United Free Church. The decisions of the Court of Session in *Craigie* v. *Marshall* (1) and *Couper* v. *Burn* (2), unless overruled by your Lordships' House, are wholly inconsistent, in my opinion, with any such right on the part of the respondents, and I am unable to support a judgment which would deprive the persons forming a minority of their rights simply upon the grounds that they are unwilling to become members of a body which has not only abandoned a fundamental principle of the Church to which they belong, but supports a principle essentially different from that on which that Church was founded.

For these reasons, I am of opinion that the appeal should be allowed.

FIRST APPEAL.

Ordered and adjudged, that the said interlocutors complained of in the said appeal be, and the same are hereby, reversed: And it is further ordered that the cause be, and the same is hereby, remitted back to the Court of Session in Scotland, with a direction to declare (1.) *that the association or body of Christians calling themselves the United Free Church of Scotland has no right, title, or interest in any part of the whole lands, properties, sums of money, and others which stood vested, as at the 30th day of October,* 1900, *in the Right Hon. John Campbell, Baron Overtoun, and others, as general trustees of the Free Church of Scotland; and* (2.) *that the said appellants (pursuers) and those adhering to and lawfully associated with them, conform to the constitution of the Free Church of Scotland, are and lawfully represent the said Free Church of Scotland, and are entitled to have the whole of said lands,*

(1) 12 D. 523. (2) 22 D. 120.

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property, and funds applied according to the terms of the trusts upon which they are respectively held for behoof of themselves and those so adhering to and associated with them, and their successors, as constituting the true and lawful Free Church of Scotland, and that the defenders, the said Right Hon. John Campbell, Baron Overtoun, and others, as general trustees aforesaid, or the defenders second enumerated, or those of the defenders in whose hands or under whose control the said lands, property, and funds may be for the time being, are bound to hold and apply the same (subject always to the trusts after mentioned) for behoof of the pursuers and those adhering to and associated with them as aforesaid, and subject to the lawful orders of the General Assembly of the said Free Church of Scotland, or its duly appointed Commission for the time being, and in particular that they are bound to denude themselves of the whole of said lands, property, and funds in favour of such parties as may be nominated as general trustees by a General Assembly of the Free Church of Scotland, or its duly appointed Commission for the time being, but subject always to the trusts upon which the said lands, property, and funds were respectively held by the said defenders for behoof of the Free Church of Scotland as at 30th October, 1900; and to do therein as shall be just and consistent with this judgment and direction: And it is further ordered that the respondents do pay, or cause to be paid, to the said appellants the costs of the action in the Court of Session, and also the costs incurred in respect of the said appeal to this House, the amount of the said last-

mentioned costs to be certified by the Clerk of the Parliaments: And it is also further ordered that unless the costs, &c.

SECOND APPEAL.

Ordered and adjudged, that the interlocutors complained of be reversed: and the cause be remitted back to the Court below, with directions to assoilzie the defenders (appellants) from the conclusions of the action: and that the respondents do pay the costs in this House and in the Court below.

Lords' Journals, August 1, 1904.

Agents for appellants: *Deacon, Gibson, Medcalf & Marriot, for Simpson & Marwick, W.S., Edinburgh.*

Agents for respondents: *Grahames, Currey & Spens, for Cowan & Dalmahoy, W.S., Edinburgh.*

APPENDIX. (1)

APPENDIX A.

Act 1560, c. 1 (Thomson's Folio Acts, ii. 526).

xvii *die Augusti.*

The Confessioun of Fayth professed and beleved be the protestantis within the Realme of Scotland publischeit be thame in Parliament and be the estaitis thairof ratefeit and apprevit as hailsome and sound doctrine groundit upoun the infallibill trewth of God's word.

(Then comes a reference to Matthew xxiv.)

The estaitis of Scotland with the Inhabitantis of the samyn professing Christ Jesus his holy evangell to thair naturall cuntrey men and to all utheris Realmes and natiounis professing the samyn Christ Jesus with thame wische grace mercie and peace from God the father of our Lord Jesus Christ with the spreit of ryteous jugement for salutatioun.

Lang have we thristit deir brethren to have notifeit unto the warld the soume of that doctrine quhilk we professit and for the quhilk we have sustenit infamy and dainger. . . . . Bot seing that of the infinite gudenes of our God

(1) See Index of documents at end of case, p. 763.

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(quha nevir sufferethe his afflictit utterlie to be confoundit) above expectation we have obtenit sum rest and libertie we culd not bot sett furth this breve and playne confession of sic doctrine as is proponit unto us and as we beleive and professe. . . . . Protesting that gif any man will note in this our confession any artickle or sentence repugning to Godis holie word that it wald pleis him of his gentilnes and for christeane cherities saik to admoneish us of the samyn in writt and we of our honoures and fidelitie do promeis unto him satisfaction fra the mowthe of God (that is fra his holy scriptureis) or ellse Reformation of that quhilk he sall prove to be amyss . . . . and thairfoir be the assistance of the michtie spreitt of the same Lord Jesus we firmelie purpoise to abyde to the end in the confessioun of this our fayth.

(Then follows the Confession of Faith in all its articles, passed one by one by the Assembly of States.)

Thir Actis and Articklis are red in the face of Parliament and ratifyit be the thre estatis of this realme at Edinburgh the sevintene day of August the yeir of God fifteen hundred and thre scoir yeiris.

APPENDIX B.

THE CONFESSION OF FAITH, 1560 (JOHN KNOX'S CONFESSION).

THE CONFESSIOUN OF FAYTH professit and belevit be the Protestantis within the realme of Scotland, publischeit by thame in Parliament, and be the Estaitis thairof ratifeit and approvit, as hailsome and sound doctrine, groundit upoun the infallable trewth of Godis word.

THE CONFESSIONE OF THE FAYTH and doctrin beleued and professed by the Protestantes of the Realme of Scotland exhibited to the estates of the sam in parliament and by thare publict votes authorised as a doctrin grounded vpon the infallable wourd of God.

1561

The Preface.

THE ESTAITIS OF SCOTLAND, with the Inhabitantis of the samyn, professing Chryst Jesus his Holy Evangell, To thair naturall Cuntreymen, and to all utheris Realmeis and Natiouns, professing the samyn Lord Jesus with thame, wische grace, peace, and mercy from God the Father of our Lord Jesus Chyrst, with the Spreit of rychteouse jugement, for Salutatioun.

Long have we thristit, deir Brethren, to haive notifeit unto the warld the soumme of that doctrine quhilk we professe, and for the quhilk we haive sustenit infamy and daingear. Bot sik hes bene the rage of Sathan against us, and against Christ Jesus his eternall veritie laitlie borne amangis us . . . . Protesting, that gif any man will note in this oure Confession any article or sentence repugning to Godis holie word, that it wald pleis him of his gentilnes, and for Christiane cherities saik, to admoneise us of the samyn in writt; and We have our honour and fidelitie do promeis unto him satisfaction fra the mouth of God, (that is, fra his holy Scriptures,) or ellis reformatioun of that quhilk he sall prove to be amyss. . . .

Of the Civile Magistrat.—CAP. XXIV.

We Confesse and acknawledge impires, kingdomis, dominiounis, and cities to be distinctit and ordanit by God: the powers and authorities in the same (be it of Emperouris in thair empyris, of Kingis in thair realmes, Dukis and Princes in thair dominiounis, or of otheris Magistratis in free cities,) to be Goddis haly ordinance, ordenit for manifestatioun of his awin glorie, and for the singulare proffite and commodite of mankynde. So that whosoever gangis about to tak away or to confound the haill state of civile policeis, now lang establischit, we affirme the same men not onlie to be enemeis to mankynde, but also wickedlie to feght against Godis expressed will. We farther Confesse and acknawledge, that sic personis as are placed in authoritie are to be loved, honoured, feared, and holdin in most reverent estimatioun: becaus that theay are the lieutennentis of God, in whose sessiounis God him self doish sit and judge, (yea evin the Judges and Princes thame selfis,) to whome by God is gevin the sweard, to the praise and defence of gud men, and to revenge and punissche all open malefactouris. Moreover, to Kingis, Princes, Rewlaris, and Magistratis, we affirme that cheiflie and maist principallie the confernatioun and purgatioun of the Religioun appertenis; so that not onlie thei are appointed for civile policey, bot also for mantenance of the trew Religioun, and for suppressing of idolatrie and superstitioun whatsomever, as in David, Josaphat, Ezechias, Josias, and otheris, heichly commended for thair zeall in that caise, may be espyit. And thairfoir we confesse and avow, that sic as resist the Supreme power, (doing that thing which apperteanis to his charge), do resist Goddis ordinance, and thairfoir can not be guiltless. And farther, we affirme, that whosoever deny unto thame thair aid, counsall, and confort, while the Princes and Rewlaris vigilantile travaill in the executing of thair office, that the same men deny thair help, supporte, and counsall to God, who be the presence of his lieutennent dois craveth it of thame.

The Giftis frelie gevin to the Kirk.—CAP. XXV.

Albeit that the worde of God trewlie preichit, and the Sacramentis rychtlie ministerit, and discipline executit according to the worde of God, be the certane and infallibill signis of the trew Kirk; we nott so meine, not that everie particulare person joynit with sic ane cumpany, be ane elect member of Christ Jesus. For we acknawledge and confesse, that dornell, cockell, and chaff, may be sawin, grow, and in great abundance ly in the middis of the wheat, that is, the reprobat may be joynit in the societie of the elect, and may externallie use with thame the benefitis of the word and sacramentis. . . .

APPENDIX C.

Act, 1567, c. 8 (Thomson, iii. 23).

Anent the Kingis aith to be gevin at his Coronatioun.

Item, Because that the incres of vertew, and suppressing of Idolatrie cravis that the Prince and the peple be of ane perfyte Religioun, quhilk of goddis

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mercie is now presentlie professit within this Realme. Thairfoir it is statute and ordanit be our Soverane Lord, my Lord Regent and thre Estatis of this present Parliament, that all Kingis, and Princes, or magistratis quhatsumever, halding thair place, quhilkis heirefter in ony tyme sall happin to Regne, and beir reule ouer this Realme, at the tyme of thair coronatioun, and ressait of thair princely authoritie, mak thair faithfull promise, be aith, in presence of the eternall God, that induring the haill cours of their lyfe, they sall serve the samin eternall God, to the uttermaist of thair power, according as he has requyrit in his maist haly word, revelit and contenit in the new and auld Testamentis. And according to the samin word, sall mantene the trew Religioun of Jesus Christ, the preicheing of his haly word, and dew and rycht ministratioun of the Sacramentis now ressaifit, and preichit within this Realme.

Act 1567, c. 12 (Thomson, iii. 24).

Anent the Jurisdictioun of the Kirk.

Item, anent the artickle proponit, and gevin in be the Kirk to my Lord Regent, and the thre Estatis of this present Parliament, anent the jurisdictioun justlie pertening to the trew Kirk, and immaculat spous of Jesus Christ: to be declarit and expressit as the artickle at mair lenth is consavit [namely, that the Church had proposed an article, and with regard to that article the Estates had regarded it]. The Kingis Grace, with avise of my lord Regent, and thre Estatis of this present Parliament, hes declarit, and grantit jurisdictioun to the said Kirk: quhilk consistis and standis in preicheing of the trew word of Jesus Christ, correctioun of maneris, and administration of haly Sacramentis: And declaris that their is na uther face of Kirk, no uther face of Religioun, than is presentlie be the favour of God establicheit within this Realme: And that thair be na uther jurisdictioun ecclesiasticall acknawlegeit within this Realme, uther than that quhilk is, and salbe within the same Kirk, or that quhilk flowis thairfra concerning the premissis. [Then the Act appointed a Commission.] And forther, our Soverane Lord, with advise of my Lord Regent, and thre Estatis foirsaidis, hes gevin, and gevis power and commissioun to Schir James Balfour, . . . ministeris of the worde of God. To seirche furth mair speciallie, and to considder quhat uther speciall pointis or clausis, sould appertene to the jurisdictioun, privilege and authoritie of the said Kirk, And to declair thair myndis thairanentis to my Lord Regent and thre Estatis of this Realme, at the nixt Parliament. Swa that they may tak ordour thairintill, and authoreis the samin be Act of Parliament as salbe fund aggreabill to the word of God.

1572, c. 3 (Thomson, iii. 72).

That the Adversaries of Christis Evangell shall not Injoy the Patrimonie of the Kirk.

. . . . every persoun quha sall pretend to be ane Minister of Goddis Word and Sacramentis or quha presently dois or sall pretend to have and bruke ony benefice use of the frutes Stipend pension or portioun furth of Benefice and ar not alreddy under the discipline of the trew Kirk and participatis not with the sacramentis thairof sall in the presence of the Archebischop Bischop Superintendent or Commissionar of the Diocie or Province quhair he hes or

sall have the Ecclesiacticall leving gif his assent and subscrive the articklis of Religioun contentit in the actis of our Soverane Lordis Parliament and gif hes aith for acknawledgeing recognoscing of our Soverane Lord and his authoritie and sall bring ane testimoniall in wryting thairupon. And oppenly on sum Sonday in tyme of sermone or publick prayeris in the Kirk quhair he ressoun of his ecclesiasticall leving he aucht to attend or of the frutes quhairof he ressavis commoditie reid baith the Testimoniall and Confessioun and of new mak the said aith within the space of ane moneth efter the Publication of this present Act. And gif he be furth of the Realme within thre scoir dayis efter the Publicatioun heirof. And in tyme cumming within ane moneth efter his admissioun under the pane that everie persoun that sall not do as is above appointed salbe Ipso facto depryvit and all his ecclesiasticall promotiounis and leving salbe vacand as gif he war than naturally deid. And gif ony persoun ecclesiasticall or quhilk sall have ecclesiastical leving sall wilfully mantene ony doctrine directly contrair or repugnant to ony of the saidis articklis and being convenit and callit as followis sall persist thairin and not revoke his errour or efter his revocatioun sall of new affirme sic untrew doctrine sic mantening affirming and persisting salbe just caus to deprive him of his ecclesiasticall leving. And it salbe lauchfull to thame befoir quhome he is callit and convenit to deprive him. Quhilk sentence of deprivatioun pronouncit he salbe deprivit in deid and his leving vacand as gif he war naturally deid. And that all Archebischopis, Bischoppis Superintendentis Professouris or Titularis of Prelattis be callit and convenit for this effect befoir the General Assemblie of the Kirk and all Inferiour persounis befoir the Archebischoppis Bischoppis Superintendentis or Commissionaris of the Diocies or Provinces within the quhilkis thay dwell.

1572, c. 4 (Thomson, iii. 72).

Anent the disobedientis quhilkis salbe ressavit to our Soverane Lordis mercy and pardoun.

1572, c. 14 (Thomson, iii. 76*).

Anent thame that sustenis the proces of Excommunicatioun.

APPENDIX D.

THE SECOND BUIK OF DISCIPLINE, or HEIDIS AND CONCLUSIONES of THE POLICIE OF THE KIRK, agreed upon in the GENERAL ASSEMBLY 1578; Inserted in the Registers of Assembly 1581; Sworn to in the National Covenant, revived and ratified by the Assembly 1638, and by many other Acts of Assembly, and according to which THE CHURCH GOVERNMENT is established by law, an. 1592 and 1690.

CHAPTER VII.

Of the Elderschips, and Assemblies, and Discipline.

1. Elderschips and assemblies are commonlie constitute of Pastors, Doctors, and sic as we commonlie call Elders, that labour not in the word and doctrine, of quhom, and of whais severall power hes bene spokin.

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2. Assemblies ar of four sortis. For aither ar they of particular kirks and congregations ane or ma, or of a province, or of ane haill nation, or of all and divers nations professing one Jesus Christ.

3. All the ecclesiasticall assemblies have power to convene lawfully togidder for treating of things concerning the kirk, and perteining to thair charge. They have power to appoynt tymes and places to that effect; and at ane meiting to appoint the dyet, time and place for anuther. . . . .

6. The finall end of all assemblies is first to keip the religion and doctrine in puritie, without error and corruption. Next, to keip cumelines and gude order in the kirk.

7. For this orders cause, they may make certane rewls and constitutions apperteining to the gude behaviour of all the members of the kirk in thair vocation.

8. They have power also to abrogate and abolish all statutes and ordinances concerning ecclesiasticall matters that are found noysome and unprofitable, and agrie not with the tyme, or ar abusit be the people.

9. They have power to execute ecclesiastical discipline and punishment upon all transgressors, and proud contemners of the gude order and policie of the kirk, and swa the haill discipline is in thair hands.

10. The first kynde and sort of assemblies, although they be within particular congregations, yet they exerce the power, authoritie, and jurisdiction of the kirk with mutuall consent, and therefore beir sumtyme the name of the kirk. When we speik of the elders of the particular congregations, we mein not that every particular parish kirk can, or may have their awin particular elderschips, specially to landwart, bot we think thrie or four, mae or fewar particular kirks, may have ane common elderschip to them all, to judge thair ecclesiasticall causes. Albeit this is meit that some of the elders be chosen out of every particular congregation, to concurre with the rest of their brethren in the common assemblie, and to take up the delations of offences within their awin kirks, and bring them to the Assemblie. This we gather of the practise of the primitive kirk, where elders or colleges of seniors were constitute in cities and famous places. . . . .

13. It belangs to this kind of assembly, to cause the ordinances made be the assemblies provinciall, nationall, and generall, to be keipit, and put in execution. To mak constitutions quhilk concerne τὸ πρέπον in the kirk, for the decent order of these particular kirks where they governe: Provyding they alter no rewls made by the general or provinciall assemblies, and that they mak the provinciall assemblies foresein of these rewls that they sal mak, and abolish them that tend to the hurt of the same.

14. It hes power to excommunicat the obstinat. . . .

18. Provinciall assemblies we call lawful conventions of the pastors, doctors, and uther eldaris of a province, gatherit for the common affaires of the kirkes thereof, quhilk also may be callit the conference of the kirk and brethren.

19. Thir assemblies are institute for weighty matters, to be intreatit be mutuall consent and assistance of the brethren within that province, as neid requyres.

20. This assemblie hes power to handle, order, and redresse all things ommittit or done amisse in the particular assemblies. It hes power to depose the office-beirers of that province for gude and just causes deserving depriva-

tion. And generallie thir assemblies have the haill power of the particular elderschips whairof they ar collectit.

21. The nationall assemblie quhilk is generall to us, is a lawfull convention of the haill kirks of the realm, or nation, where it is usit and gatherit for the common affaires of the kirk; and may be callit the general eldership of the haill kirk within the realme. Nane ar subject to repaire to this assemblie to vote bot ecclesiasticall persons to sic a number as shall be thocht gude be the same assemblie: Not excluding uther persons that will repaire to the said assemblie to propone, heir and reason.

22. This assemblie is institute, that all things aither omittit, or done amisse in the provinciall assemblies, may be redressit and handlit: And things generally serving for the weill of the haill bodie of the kirk within the realme may be foirsein, intreatit, and set furth to Godis glorie.

23. It sould tak cair, that kirks be plantit in places quhair they are not plantit. It sould prescryve the rewll how the uther twa kynds of assemblies sould proceed in all things.

24. This assemblie sould tak heid, that the spirituall jurisdiction and civill be not confoundit to the hurt of the kirk: That the patrimonie of the kirk be not consumit nor abusit: And generallie concerning all weighty affaires that concerne the weill and gude order of the haill kirks of the realm, it aucht to interpone authoritie thairto.

25. There is besydes these, an uther mair generall kynde of assemblie, quhilk is of all nations and estaits of persons within the kirk, representing the universal kirk of Christ: Quhilk may be callit properlie the Generall Assemblie or Generall Councell of the haill kirk of God.

These assemblies were appoyntit and callit together, specially when ony great schisme or contraversie in doctrine did aryse in the kirk, and wer convocat at command of godlie emperours being for the tyme, for the avoiding of schismes within the universal kirk of God: Quhilk because they apperteine not to the particular estait of ane realme, we ceis further to speik of them.

CHAPTER X.

Of the Office of a Christian Magistrate in the Kirk.

1. Although all the members of the kirk be halden every ane in their vocation, and according therto to advance the kingdom of Jesus Christ sa far as lyis in their power; yit chiefly Christian Princes, and uther magistrates, ar halden to do the same: For they ar callit in the Scripture nourishers of the kirk, for sameikle as be them it is, or at least aucht to be manteinit, fosterit, uphalden, and defendit against all that wald procure the hurt thereof.

2. Sua it perteins to the office of a Christian magistrat to assist and fortifie the godly proceidings of the kirk in all behalfes; and namely to sie that the publique estait and ministrie thereof be manteinit and susteinit as it apperteins, according to Godis word. . . . .

5. To sie that sufficient provision be made for the ministrie, the schules, and the puir: And if they have not sufficient to awaite upon their charges, to supplie their indigence even with their awin rents, if neid require. To hald hand als weill to the saving of their persons from injurie and opin violence;

as to their rents and possessions, that they be not defraudit, robbit, nor spuilziet thereof. . . . .

7. To mak lawis and constitutions agreeable to God's word, for advancement of the kirk, and policie thereof; without usurping ony thing that perteins not to the civil sword, bot belangs to the offices that ar meirlie ecclesiasticall, as is the ministrie of the word and sacramentis, using of ecclesiasticall discipline, and the spirituall execution thereof, or ony part of the power of the spiritual, keyis, quhilks our Maister gave to the Apostles, and their trew successours, And although Kings and Princes that be godlie, sumtymes be their awin authority, whan the kirk is corruptit, and all things out of order, place ministers, and restore the trew service of the Lord, efter the exemples of sum godly Kings of Juda, and divers godly Emperours and Kings also in the licht of the New Testament: Yit quhair the ministrie of the kirk is anes lawfullie constitute, and they that are placeit do thair office faithfullie, all godlie princes and magistratis aucht to heir and obey thair voice, and reverence the majestie of the Son of God speiking be them.

APPENDIX E.

THE CONFESSION OF FAITH, agreed upon by the Assembly of Divines at Westminster, with the assistance of Commissioners from the Church of Scotland, as a part of the Covenanted Uniformity in Religion betwixt the Churches of Christ in the Kingdoms of Scotland, England, and Ireland. Approved by the General Assembly, 1647, and ratified and established by Acts of Parliament 1649 and 1690, as the publick and avowed confession of the Church of Scotland. [Thomson, vi. 161; ix. 117.]

CHAPTER I.—*Of the Holy Scripture.*

I. Although the light of nature, and the works of creation and providence, do so far manifest the goodness, wisdom, and power of God, as to leave men inexcusable; yet are they not sufficient to give that knowledge of God, and of his will, which is necessary unto salvation: therefore it pleased the Lord, at sundry times, and in divers manners, to reveal himself, and to declare that his will unto his church; and afterwards, for the better preserving and propagating of the truth, and for the more sure establishment and comfort of the Church against the corruption of the flesh, and the malice of Satan and of the world, to commit the same wholly unto writing; which maketh the holy scripture to be most necessary; those former wayes of God's revealing his will unto his people being now ceased . . . .

VIII. The Old Testament in Hebrew (which was the native language of the people of God of old), and the New Testament in Greek (which at the time of the writing of it was most generally known to the nations), being immediately inspired by God, and by his singular care and providence kept pure in all ages, are therefore authentical; so as in all controversies of religion, the Church is finally to appeal unto them. But because these originall tongues are not known to all the people of God, who have right unto and interest in the scriptures,

and are commanded, in the fear of God, to read and search them, therefore they are to be translated into the vulgar language of every nation unto which they come, that the word of God dwelling plentifully in all, they may worship him in an acceptable manner, and, through patience and comfort of the scriptures, may have hope.

CHAPTER II.—*Of God, and of the Holy Trinity.*

III. In the unity of the Godhead, there be three persons of one substance, power, and eternity; God the Father, God the Son, and God the Holy Ghost, The Father is of none, neither begotten nor proceeding; the Son is eternally begotten of the Father; the Holy Ghost eternally proceeding from the Father and the Son.

CHAPTER III.—*Of God's Eternall Decree.*

III. By the decree of God, for the manifestation of his glory, some men and angels are predestinated unto everlasting life, and others foreordained to everlasting death.

IV. These angels and men, thus predestinated and foreordained, are particularly and unchangeably designed; and their number is so certain and definite, that it cannot be either increased or diminished.

V. Those of mankind that are predestinated unto life, God, before the foundation of the world was laid, according to his eternall and immutable purpose, and the secret councill and good pleasure of his will, hath chosen in Christ unto everlasting glory, out of his meer free grace and love, without any foresight of faith or good works, or perseverance in either of them, or any other thing in the creature, as conditions, or causes moving him therunto; and all to the praise of his glorious grace.

CHAPTER VI.—*Of the Fall of Man, of Sin, and of the Punishment thereof.*

IV. From this original corruption, whereby we are utterly indisposed, disabled, and made opposite to all good, and wholly inclined to all evil, do proceed all actual transgressions . . . .

VI. Every sin, both original and actuall, being a transgression of the righteous law of God, and contrary thereunto, doth, in its own nature, bring guilt upon the sinner, whereby he is bound over to the wrath of God, and curse of the law, and so made subject to death, with all miseries spirituall, temporall, and eternall.

CHAPTER VII.—*Of God's Covenant with Man.*

III. Man by his fall having made himself uncapable of life by that covenant, the Lord was pleased to make a second, commonly called the Covenant of Grace; whereby he freely offereth unto sinners life and salvation by Jesus Christ, requiring of them faith in him, that they may be saved; and promising to give unto all those that are ordained unto life his Holy Spirit, to make them willing and able to believe.

CHAPTER IX.—*Of Free Will.*

III. Man, by his fall into a state of sin, hath wholly lost all ability of will to any spirituall good accompanying salvation; so as a natural man, being

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altogether averse from that good, and dead in sin, is not able, by his own strength, to convert himself, or to prepare himself thereunto.

CHAPTER X.—*Of Effectuall Calling.*

I. All those whom God hath predestinated unto life, and those only, he is pleased, in his appointed and accepted time effectually to call, by his word and Spirit, out of that estate of sin and death in which they are by nature, to grace and salvation by Jesus Christ; inlightening their minds spiritually and savingly to understand the things of God; taking away their heart of stone, and giving unto them an heart of flesh; renewing their wills, and by his almighty power determining them to that which is good; and effectually drawing them to Jesus Christ; yet so as they come most freely, being made willing by his grace. . . .

III. Elect infants, dying in infancy, are regenerated and saved by Christ through the Spirit, who worketh when and where, and how he pleaseth. So also are all other elect persons, who are uncapable of being outwardly called by the ministry of the word.

IV. Others not elected, although they may be called by the ministry of the word, and may have some common operations of the Spirit, yet they never truly come unto Christ, and therefore cannot be saved: much less can men not professing the Christian religion be saved in any other way whatsoever, be they never so diligent to frame their lives according to the light of nature, and the law of that religion they do profess; and to assert and maintain that they may, is very pernicious, and to be detested.

CHAPTER XI.—*Of Justification.*

I. Those whom God effectually calleth he also freely justifieth; not by infusing righteousness into them, but by pardoning their sins, and by accounting and accepting their persons as righteous: not for anything wrought in them, or done by them, but for Christ's sake alone: not by imputing faith itself, the act of believing, or any other evangelicall obedience to them as their righteousness; but by imputing the obedience and satisfaction of Christ unto them, they receiving and resting on him and his righteousness by faith: which faith they have not of themselves; it is the gift of God.

CHAPTER XIV.—*Of Saving Faith.*

I. The grace of faith, whereby the elect are enabled to believe to the saving of their souls, is the work of the Spirit of Christ in their hearts, and is ordinarily wrought by the ministry of the word: by which also, and by the administration of the sacraments and prayer, it is increased and strengthened.

II. By this faith, a Christian believeth to be true whatsoever is revealed in the word, for the authority of God himself speaking therein; and acteth differently upon that which each particular passage thereof containeth; yielding obedience to the commands, trembling at the threatnings, and embracing the promises of God for this life and that which is to come. But the principal acts of saving faith are, accepting, receiving, and resting upon Christ alone for justification, sanctification, and eternal life, by virtue of the covenant of grace.

CHAPTER XV.—*Of Repentance unto Life.*

I. Repentance unto life is an evangelicall grace, the doctrine whereof is to be preached by every minister of the gospel.

II. By it a sinner, out of the sight and sense, not only of the danger, but also of the filthiness and odiousness of his sins, as contrary to the holy nature and righteous law of God, and upon the apprehension of his mercy in Christ to such as are penitent, so grieves for and hates his sins, as to turn from them all unto God, purposing and endeavouring to walk with him in all the ways of his commandments.

III. Although repentance be not to be rested in, as any satisfaction for sin, or any cause of the pardon thereof, which is the act of God's free grace in Christ; yet is it of such necessity to all sinners that none may expect pardon without it.

V. Men ought not to content themselves with a general repentance, but it is every man's duty to endeavour to repent of his particular sins particularly.

VI. As every man is bound to make private confession of his sins to God, praying for the pardon thereof; upon which, and the forsaking of them, he shall find mercy; so he that scandalizeth his brother, or the church of Christ, ought to be willing, by a private or publick confession and sorrow for his sin, to declare his repentance to those that are offended; who are thereupon to be reconciled to him, and in love to receive him.

CHAPTER XXIII.—*Of the Civil Magistrate.*

I. God, the supreme Lord and King of all the world, hath ordained civil magistrates to be under him over the people, for his own glory, and the publick good; and, to this end, hath armed them with the power of the sword, for the defence and encouragement of them that are good, and for the punishment of evil-doers.

II. It is lawful for Christians to accept and execute the office of a magistrate, when called thereunto: in the managing whereof, as they ought especially to maintain piety, justice, and peace, according to the wholesome laws of each commonwealth; so, for that end, they may lawfully, now under the New Testament, wage war upon just and necessary occasion.

III. The civil magistrate may not assume to himself the administration of the word and sacraments, or the power of the keys of the kingdom of heaven; yet he hath authority, and it is his duty, to take order, that unity and peace be preserved in the church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered, and observed. For the better effecting whereof, he hath power to call synods, to be present at them, and to provide that whatsoever is transacted in them be according to the mind of God.

IV. It is the duty of people to pray for magistrates, to honour their persons, to pay them tribute and other dues, to obey their lawful commands, and to be subject to their authority for conscience' sake.

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CHAPTER XXV.—*Of the Church.*

I. The catholick or universall church, which is invisible, consists of the whole number of the elect that have been, are, or shall be gathered into one, under Christ the head thereof; and is the spouse, the body, the fulness of him that filleth all in all.

II. The visible church, which is also catholick or universal under the gospell (not confined to one nation, as before under the law,) consists of all those throughout the world that profess the true religion, together with their children; and is the kingdom of the Lord Jesus Christ, the house and family of God, out of which there is no ordinary possibility of salvation.

VI. There is no other head of the church but the Lord Jesus Christ: nor can the Pope of Rome in any sense be head thereof; but is that antichrist, that man of sin, and son of perdition, that exalteth himself in the church against Christ, and all that is called God.

CHAPTER XXX.—*Of Church Censures.*

I. The Lord Jesus, as king and head of his church, hath therein appointed a government in the hand of church-officers, distinct from the civil magistrate.

II. To these officers the keys of the kingdom of heaven are committed, by virtue whereof they have power respectively to retain and remit sins, to shut that kingdom against the impenitent, both by the word and censures; and to open it unto penitent sinners, by the ministry of the gospell, and by absolution from censures, as occasion shall require.

CHAPTER XXXI.—*Of Synods and Councills.*

II. As magistrates may lawfully call a synod of ministers, and other fit persons, to consult and advise with about matters of religion; so if magistrates be open enemies to the church, the ministers of Christ, of themselves, by virtue of their office, or they, with other fit persons upon delegation from their churches, may meet together in such assemblies.

III. It belongeth to synods and councills ministerially to determine controversies of faith, and cases of conscience; to set down rules and directions for better ordering of the publick worship of God, and government of his church; to receive complaints in cases of maladministration, and authoritatively to determine the same: which decrees and determinations (if consonant to the word of God) are to be received with reverence and submission, not only for their agreement with the word, but also for the power whereby they are made, as being an ordinance of God, appointed thereunto in his word.

IV. All synods or councills since the apostles' times, whether general or particular, may err, and many have erred; therefore they are not to be made the rule of faith or practice, but to be used as an help in both.

V. Synods and councills are to handle or conclude nothing but that which is ecclesiastical; and are not to intermeddle with civil affairs, which concern the commonwealth, unless by way of humble petition, in cases extraordinary; or by way of advice for satisfaction of conscience, if they be thereunto required by the civil magistrate.

APPENDIX F.

Act, 1690, c. 7 (Thomson, ix. 133).

Act ratifying the Confession of Faith and settling Presbyterian Church Government.

In the first place to settle and secure therein the true protestant Religion according to the truth of God's word as it hath of a long tyme been professed within this Land as also the Government of Christ's Church within this Nation agreeable to the word of God and most conducive to the advancement of true piety and Godliness and the establishing of peace and tranquility within this Realme, And that by ane Article of the Claime of Right, It is declared that the prelacie and the superiority of any office in the Church above presbyters, Is and hath been a great and insupportable greivance . . . . Lyke as by ane Act of the last Session of this Parliament Prelacie is abolished Therefore Their Majesties with advyce and consent of the saids three Estates Doe hereby revive ratifie and perpetually confirm all lawes statutes and acts of Parliament made against popery and papists And for the maintenance and preservation of the true reformed protestant religion and for the true Church of Christ within this kingdom, In swa far as they confirme the same or are made in favours thereof: Lyke as they by these presents Ratifie and establish the Confession of faith now read in their presence and voted and approven be them as the publick and avowed Confession of this Church containeing the summe and substance of the doctrine of the reformed Churches which Confession of Faith is subjoyned to this present Act: As also, They doe establish ratifie and confirme the presbyterian Church Government and discipline That is to say the Government of the Church by Kirke sessions, presbyteries, provinciall synods and general Assemblies ratified and established by the Act of 1592, c. 8. And thereafter received by the generall consent of this Nation to be the only Government of Christ's Church within this Kingdome Reviveing Renewing and Confirmeing the forsaid act of Parliament in the haill heids thereof except that part of it relateing to patronages which is hereafter to be taken into consideration. And Rescinding Annulling and makeing voyd the Acts of Parliament following [Popish and Prelacy Acts]. [These Acts being] Inconsistent with, or derogatory from the protestant Religion and presbyterian Government now established. . . . . In pursuance of the premises Their Majisties doe hereby appoint the first meeting of the Generall assembly of this Church as above established to be at Edinburgh the third thursday of october nextocome In this instant year 1690: . . . . And to the effect the disorders that have hapned in this Church may be redressed Their Majesties with advyce and consent foresaid Doe hereby allow the Generall meeting and representatives of the forsaid presbyterian ministers and elders in whose hands the exercise of the Church Government is established either by themselves or by such Ministers and elders as shall be appointed and authorised visitors by them, according to the custom and practice of Presbyterian Government throughout the whole kingdom and severall parts thereof, to try and purge out all Insufficient, negligent, scandalous and erroneous Ministers by due course of ecclesiasticall processes and censures, and likewayes for redressing all other Church disorders; And further it is hereby provyded

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that whatsoever Minister being conveened before the said Generall meeting and representatives of the presbyterian ministers and elders or the visitors to be appointed by them shall either prove contumacious in not compearing or be found guilty, and shall be therefore censured whether by suspension or deposition they shall ipso facto be suspended from or depryved of their stipends and benefices.

Act 1690, c. 53 (Thomson, ix. 196).

Act concerning Patronages.

And to the effect the calling and entering Ministers in all tyme comeing may be orderly and regularly performed. Their Majesties with consent of the Estates of Parliament Doe Statute and Declare, That in case of the vacancie of any particular Church and for supplyeing the same with a Minister the Heretors of the said parish (being protestants) and the elders are to name and propose the persone to the whole congregatione to be either approven or disapproven by them. And if they disapprove, that the disapprovers give in their reasons to the effect the affair may be cognosced upon by the presbytery of the bounds. . . .

Act 1693, c. 38 (Thomson, ix. 303).

Act for Setling the Quiet and Peace of the Church.

Approve and perpetually Confirme the fyfth Act of the Second Session of this Current Parliament Entituled Act Ratifying the Confession of Faith and Settleing Presbyterian Church Government In the whole Heads Articles and Clauses thereof And do further Statute and Ordaine that no person be Admitted or continued for hereafter to be a minister or preacher within this Church, unless that he having first taken and subscribed the .... assurance in manner appointed by another Act of this present session of Parliament. [That is the declaration of allegiance.] Do also subscribe the Confession of Faith ratifyed in the foresaid fyfth act of the second session of this Parliament declaring the same to be the confession of his faith and that he owns the doctrine therein contained to be the true doctrine which he will constantly adhere to.

APPENDIX G.

THE BARRIER ACT.

8th January, 1697.

Act anent the Method of passing Acts of Assembly of General Concern to the Church, and for preventing of Innovations.

(Commonly called the Barrier Act.)

The General Assembly, taking into their consideration the overture and Act made in the last Assembly concerning innovations, and having heard the report of the several commissioners from Presbyteries to whom the consideration of the same was recommended, in order to its being more ripely advised

and determined in this Assembly, and considering the frequent practice of former Assemblies of this Church, and that it will mightily conduce to the exact obedience of the Acts of Assemblies, that General Assemblies be very deliberate in making of the same, and that the whole Church have a previous knowledge thereof, and their opinion be had therein, and for preventing any sudden alteration or innovation, or other prejudice to the Church, in either doctrine or worship or discipline or government thereof, now happily established; do therefore appoint, enact, and declare, that before any General Assembly of this Church shall pass any Acts, which are to be binding rules and constitutions to the Church, the same Acts be first proposed as overtures to the Assembly, and, being by them passed as such, be remitted to the consideration of the several Presbyteries of this Church, and their opinions and consent reported by their Commissioners to the next General Assembly following, who may then pass the same in Acts, if the more general opinion of the Church, thus had, agree thereunto.

CLAIM, DECLARATION, AND PROTEST ANENT ENCROACHMENTS OF THE COURT OF SESSION. GENERAL ASSEMBLY, MAY 30, 1842.

WITH ADDRESS TO THE QUEEN, ACT XX.

"The General Assembly of the Church of Scotland, taking into consideration the solemn circumstances in which, in the inscrutable providence of God, this Church is now placed; and that, notwithstanding the securities for the government thereof by General Assemblies, Synods, Presbyteries, and Kirk-Sessions, and for the liberties, government, jurisdiction, discipline, rights and privileges of the same provided by the statutes of the realm by the constitution of this country, as unalterably settled by the Treaty of Union, and by the oath, 'inviolably to maintain and preserve' the same, required to be taken by each Sovereign at accession . . . . these have been of late assailed by the very Court to which the Church was authorized to look for assistance and protection, to an extent that threatens their entire subversion, with all the grievous calamities to this Church and nation which would inevitably flow therefrom; did and hereby do, solemnly and in reliance on the grace and power of the Most High, resolve and agree on the following Claim, Declaration, and Protest." . . . "Whereas it is an essential Doctrine of this Church, and a fundamental principle in its constitution, as set forth in the Confession of Faith thereof, in accordance with the Word and law of the most Holy God, that 'there is no other Head of the Church but the Lord Jesus Christ'" (a reference is given to the Confession, Chapter xxv.) "and that while 'God the supreme Lord and King of all the World hath ordained Civil Magistrates to be under him over the people, for his own glory, and the public good, and to this end hath armed them with the power of the sword' (Chapter xxiii. Sec. 1); and while 'it is the duty of people to pray for magistrates, to honour their persons, to pay them tribute and other dues, to obey their lawful commands and to be subject to their authority for conscience sake,' 'from which ecclesiastical persons are not exempted' (Chapter xxiii. Sec. 4); and while the

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magistrate hath authority and it is his duty, in the exercise of that power which alone is committed to him, namely, 'the power of the sword' or civil rule, as distinct from the 'power of the keys' or spiritual authority, expressly denied to him, to take order for the preservation of purity, peace, and unity in the Church, yet 'the Lord Jesus as King and Head of his Church hath therein appointed a government in the hand of Church officers distinct from the civil magistrate' (Chapter xxx. Sec. 1); which government is ministerial, not lordly, and to be exercised in consonance with the laws of Christ, and with the liberties of His people." . . . "And whereas, according to the said Confession, and to the other standards of the Church, and agreeably to the Word of God, this government of the Church, thus appointed by the Lord Jesus, in the hand of Church officers, distinct from the civil magistrate or supreme power of the State, and flowing directly from the Head of the Church to the office-bearers thereof, to the exclusion of the civil magistrate, comprehends" . . . . "the preaching of the Word, administration of the Sacraments, correction of manners, the admission of the office-bearers of the Church to their offices, their suspension and deprivation therefrom, the infliction and removal of Church censures, and, generally, the whole 'power of the keys.'" . . . "And whereas this jurisdiction and government, since it regards only spiritual condition, rights and privileges, doth not interfere with the jurisdiction of secular tribunals whose determinations as to all temporalities conferred by the State upon the Church, and as to all civil consequences attached by law to the decisions of Church Courts in matters spiritual, this Church hath ever admitted, and doth admit, to be exclusive and ultimate, as she hath ever given and inculcated implicit obedience thereto: And whereas the above-mentioned essential doctrine and fundamental principle in the constitution of the Church, and the government and exclusive jurisdiction flowing therefrom, founded on God's Word, and set forth in the Confession of Faith and other standards of this Church, have been, by diverse and repeated Acts of Parliament, recognised, ratified, and confirmed" . . . . [Reference was then made to a series of Acts of Parliament already given] . . . . "by which enactment" [that is, one of the last ones—1567, c. 7] "declaration and acknowledgment, the State recognised and established as a fundamental principle of the constitution of the kingdom, that the jurisdiction of the Church in these matters was 'given by God' to the office-bearers thereof, and was exclusive, and free from coercion by any tribunals holding power or authority from the State or supreme civil magistrate." . . . "And whereas, not only was the exclusive and ultimate jurisdiction of the Church Courts in the government of the Church, and especially in the particular matters, spiritual and ecclesiastical, above mentioned, recognised, ratified and confirmed —thus necessarily implying the denial of power on the part of any secular tribunal, holding its authority from the Sovereign, to review the sentence of the Church Courts in regard to such matters, or coerce them in the exercise of such jurisdiction; but all such power, and all claim on the part of the Sovereign to be considered supreme governor over the subjects of this kingdom of Scotland in causes *ecclesiastical and spiritual*, as he is in causes *civil and temporal*, was, after a long-continued struggle, finally and *expressly repudiated and cast out of the constitution* of Scotland, *as inconsistent with the Presbyterian Church government* established at the Revolution, and thereafter unalterably

secured by the Treaty of the Union with England; by the constitution of which latter kingdom, differing in this respect from that of Scotland, the Sovereign is recognised to be supreme governor, '*as well* in all *spiritual and ecclesiastical* things and causes as *temporal*.'" [It then referred to the Censure of Robert Montgomery, 1582, and the Acts 1584 (a Black Act); 1592, c. 116; 1584, c. 129 (a Black Act); 1612, c. 1; 1661, c. 11; 1681, c. 6; 1669, c. 1; 1689, c. 18; 1690, c. 1; 1706, c. 6.] . . . . "And whereas, diverse civil rights and privileges were, by various statutes of the Parliament of Scotland, prior to the Union with England, secured to this Church, and certain civil consequences attached to the sentences of the Courts thereof, which were farther directed to be aided and made effectual by all magistrates, judges, and officers of the law; and in particular." [Then there are narrated various statutes: 1592, c. 117; 1690, c. 5; 1693, c. 22; 1695, c. 22; 1705, c. 4; 1706, c. 6 and c. 7. It then referred to the patronage question, and proceeded to shew how the question of patronage stood under the statutes, and how it had been abolished in 1690 and re-enacted by the Act of 10 Anne, c. 12.] . . . . "And whereas, at the Union between the two kingdoms, the Parliament of Scotland, being determined that the 'true Protestant religion,' as then professed, 'with the worship, discipline, and government of this Church, should be effectually and unalterably secured,' did, in their Act, appoint commissioners to treat with commissioners from the Parliament of England (1705, c. 4) as to an union of the kingdoms, provide 'That the said commissioners shall *not* treat of or concerning any alteration' of the worship, discipline, and government of the Church of this kingdom as now by law established." [It proceeds to shew how the question of patronage stood under the statute, and how it had been abolished in 1690, and how it had been by the Act of Queen Anne restored.] . . . . "And whereas while this Church protested against the passing of the above-mentioned Act of Queen Anne, as 'contrary to the constitution of the Church, so well secured by the Treaty of Union and solemnly ratified by Acts of Parliament in both kingdoms,' and for more than seventy years thereafter uninterruptedly sought for its repeal, she at the same time maintained and practically exercised without question or challenge from any quarter the jurisdiction of her Courts to determine ultimately and exclusively under what circumstances they would admit candidates into the office of the holy ministry, or constitute the pastoral relationship between minister and people, and generally to 'order and conclude the entry of particular ministers.'" . . . "And whereas in particular this Church required, as necessary to the admission of a minister to the charge of souls, that he should have received a call from the people over whom he was to be appointed, and did not authorize or permit any one so to be admitted till such call had been sustained by the Church Courts, and did, before and subsequent to the passing of the said Act of Queen Anne, declare it to be a fundamental principle of the Church, as set forth in her authorized standards, and particularly in the Second Book of Discipline (Ch. iii. Sec. 5), repeated by Act of Assembly in 1638, that no pastor be intruded upon any congregation contrary to the will of the people." [Then it proceeded to set out all that was done by the Courts, citing the following cases: *Auchterarder Case*, (1838) 16 S. 661; *Auchtermuchty* (*Moncrieff* v. *Maxton*), (1735); *Culross* (*Cochrane* v. *Forbes*), (1751); *Lanark* (*Dick* v. *Carmichael*), (1752) Mor. Dict. 9954; *Forbes* (*Forbes* v. *M'William*), (1762)

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Mor. Dict. 9931; *Dunse* (*Hay* v. *Presbytery of Dunse*), (1749) Mor. Dict. 9911; *Unst* (*Lord Dundas* v. *Presbytery of Shetland*), (1795) Bell's Cases, 169; *First Lethendy Case*, (1839) 1 D. 955; *Stewarton Case*, (1843) 5 D. 427; *Marnoch Case*, (1840) 3 D. 282; *Daviot Case*; *Strathbogie Cases*, *Nos.* 1, 2, 3, 5, (1840) 2 D. 258, 585, 1047, 1380; (1840) 3 D. 282; (1843) 5 D. 909; *Auchterarder Case*, (1841) 3 D. 778; (1842) 4 D. 957; *Culsalmond*, (1842) 5 D. 909, *Cambusnethan*, and *Stranraer* (*Wilson* v. *Presbytery of Stranraer*, (1842) 4 D. 1294) *Cases*. Then it proceeds: "And whereas farther encroachments are threatened on the government and discipline of the Church as by law established, in actions now depending before the said Court, in which it is sought to have sentences of deposition from the office of the holy ministry reduced and set aside [*Third Auchterarder Case* and *Third Lethendy Case*] and minorities of inferior judicatories authorized to take on trial and admit to the office of the holy ministry, in disregard of, and in opposition to, the authority of the judicatories of which they are members, and of the superior judicatories to which they are subordinate and subject: and whereas the government and discipline of Christ's Church cannot be carried on according to His laws and the constitution of His Church subject to the exercise by any secular tribunal of such powers as have been assumed by the said Court of Session: And whereas this Church, highly valuing as she has ever done her connection on the terms contained in the statutes hereinbefore recited with the State and her possession of the temporal benefits thereby secured to her for the advantage of the people, must nevertheless, even at the risk and hazard of the loss of that connection and of these public benefits—deeply as she would deplore and deprecate such a result for herself and the nation—persevere in maintaining her liberties as a Church of Christ, and in carrying on the government thereof on her own constitutional principles, and must refuse to intrude ministers on her congregations, to obey the unlawful coercion attempted to be enforced against her in the exercise of her spiritual functions and jurisdiction, or to consent that her people be deprived of their rightful liberties. . . ." "Therefore the General Assembly, while, as above set forth, they fully recognise the absolute jurisdiction of the Civil Courts in relation to all matters whatsoever of a civil nature, and especially in relation to all the temporalities conferred by the State upon the Church, and the civil consequences attached by law to the decisions, in matters spiritual, of the Church Courts,—Do, in name and on behalf of this Church, and of the nation and people of Scotland, and under the sanction of the several statutes, and the Treaty of Union hereinbefore recited, claim, as of right, That she shall freely possess and enjoy her liberties, government, discipline, rights and privileges, according to law, especially for the defence of the spiritual liberties of her people, and that she shall be protected therein from the foresaid unconstitutional and illegal encroachments of the Court of Session, and her people secured in their Christian and constitutional rights and liberties. And they declare that they cannot, in accordance with the Word of God, the authorized and ratified standards of this Church, and the dictates of their consciences, intrude ministers on reclaiming congregations, or carry on the government of Christ's Church, subject to the coercion attempted by the Court of Session as above set forth; and that at the risk and hazard of suffering the loss of the secular benefits conferred by the State and the public advantages of an Establishment, they must, as by God's grace they will, refuse so to do. . . ."

[The Protest]: "And they protest that all and whatsoever Acts of the Parliament of Great Britain passed without the consent of this Church and Nation, in alteration of or derogation to the aforesaid Government, discipline, rights, and privileges of this Church (which were not allowed to be treated of by the Commissioners for settling the terms of the union between the two Kingdoms, but were secured by antecedent stipulation provided to be inserted, and inserted in the Treaty of Union as an unalterable and fundamental condition thereof, and so reserved from the cognisance and power of the federal Legislature created by the said Treaty), as also all and whatsoever sentences of Courts in contravention of the same government, discipline, rights, and privileges are and shall be in themselves void and null and of no legal force or effect; and that, while they will accord full submission to all such acts and sentences, in so far—though in so far only—as these may regard civil rights and privileges, whatever may be their opinion of the justice or legality of the same, their said submission shall not be deemed an acquiescence therein, but that it shall be free to the members of this Church, or their successors, at any time hereafter, when there shall be a prospect of obtaining justice, to claim the restitution of all such civil rights and privileges, and temporal benefits and endowments, as for the present they may be compelled to yield up in order to preserve to their office-bearers the free exercise of their spiritual government and discipline, and to their people the liberties of which respectively it has been attempted, so contrary to law and justice, to deprive them. . . ." "To witness that it is for their adherence to that doctrine as set forth in their Confession of Faith, and ratified by the laws of this kingdom, and for the maintenance by them of the jurisdiction of the office-bearers, and the freedom and privileges of the members of the Church from that doctrine flowing, that this Church is subjected to hardship, and that the rights so sacredly pledged and secured to her are put in peril; and they especially invite all the office-bearers and members of this Church, who are willing to suffer for their allegiance to their adorable King and Head, to stand by the Church, and by each other, in defence of the doctrine aforesaid, and of the liberties and privileges, whether of office-bearers or people, which rest upon it; and to unite in supplication to Almighty God, that He would be pleased to turn the hearts of the rulers of this kingdom, to keep unbroken the faith pledged to this Church, in former days, by statutes and solemn treaty, and the obligations, come under to God himself, to preserve and maintain the government and discipline of this Church in accordance with His word." . . . "And that in His own good time, He would restore to them these benefits, the fruits of the struggles and sufferings of their fathers in times past in the same cause; and, thereafter, give them grace to employ them more effectually than hitherto they have done for the manifestation of His glory."

Protest by those Commissioners to the General Assembly appointed to meet May 18, 1843, by whom this Assembly was constituted [General Assembly, 1843, Act 1, at Edinburgh and within a large Hall at Canonmills]: "The Commissioners to the General Assembly of the Church of Scotland, appointed to have been holden this day, having met in St. Andrews Church, the Ministers and Elders, Commissioners thereto, whose names are appended to the Protest then and there made and hereinafter inserted, having

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withdrawn from that place and having convened in a large Hall at Canonmills in presence of a great concourse of Ministers, Elders, and people, and having duly constituted themselves in the name of the Head of the Church, and appointed the Rev. Dr. Chalmers to be their Moderator, the Protest above-mentioned was produced and read, and thereafter ordered to be recorded as follows": "We, the undersigned Ministers and Elders, chosen as Commissioners to the General Assembly of the Church of Scotland indicted to meet this day, but precluded from holding the said Assembly by reason of the circumstances hereinafter set forth, in consequence of which a Free Assembly of the Church of Scotland, in accordance with the laws and constitution of the said Church, cannot at this time be holden." Then it proceeds: "Considering that the Legislature, by their rejection of the Claim of Right adopted by the last General Assembly of the said Church, and their refusal to give redress and protection against the jurisdiction assumed, and the coercion of late repeatedly attempted to be exercised over the Courts of the Church in matters spiritual by the Civil Courts . . . have recognised and fixed the conditions of the Church Establishment as henceforth to subsist in Scotland, to be such as these have been pronounced and declared by the said Civil Courts in their several recent decisions, in regard to matters spiritual and ecclesiastical, whereby it has been held inter alia" [then there are some eight different heads having reference to the various decisions which had been pronounced with reference to the intruding upon them of pastors against the will of the congregation] . . . . "and in particular in the admission to the office of the holy ministry, and the constitution of the pastoral relation, and that they are subject to be compelled to intrude ministers" . . . . "And Farther Considering, that in these circumstances, a Free Assembly of the Church of Scotland, by law established, cannot at this time be holden, and that an assembly, in accordance with the fundamental principles of the Church, cannot be constituted in connection with the State without violating the conditions which must now, since the rejection by the Legislature of the Church's Claim of Right, be held to be the conditions of the Establishment: And Considering that, while heretofore as members of Church Judicatories ratified by law and recognised by the constitution of the kingdom, we held ourselves entitled and bound to exercise and maintain the jurisdiction vested in these judicatories with the sanction of the Constitution, notwithstanding the decrees as to matters spiritual and ecclesiastical of the Civil Courts, because we could not see that the State had required submission thereto as a condition of the Establishment" . . . . "but . . . . we are now constrained to acknowledge it to be the mind and will of the State, as recently declared, that such submission should and does form a condition of the Establishment, and of the possession of the benefits thereof" . . . . "We, therefore, the Ministers and Elders foresaid," "Do protest, that the conditions foresaid, while we deem them contrary to and subversive of the settlement of Church government effected at the Revolution, and solemnly guaranteed by the Act of Security and Treaty of Union are also at variance with God's Word, in opposition to the doctrines and fundamental principles of the Church of Scotland, inconsistent with the freedom essential to the right constitution of a Church of Christ, and incompatible with the government which He, as the Head of His Church, hath therein appointed distinct from

the Civil magistrate: And we farther Protest, that any Assembly constituted in submission to the conditions now declared to be law, and under the civil coercion which has been brought to bear on the election of Commissioners to the Assembly this day appointed to have been holden, and on the Commissioners chosen thereto, is not and shall not be deemed a lawful and Free Assembly of the Church of Scotland according to the original and fundamental principles thereof; and that the Claim, Declaration, and Protest of the General Assembly which convened at Edinburgh in May 1842 [see Appx. G, p. 737], as the Act of a free and lawful Assembly of the said Church, shall be holden as setting forth the true constitution of the said Church; and that the said Claim, along with the laws of the Church now subsisting, shall in no wise be affected by whatsoever acts and proceedings of any Assembly constituted under the conditions now declared to be the law, and in submission to the coercion now imposed on the establishment." And finally while firmly asserting the right and duty of the civil magistrate to maintain and support an establishment of religion in accordance with God's Word, and reserving to ourselves and our successors to strive by all lawful means, as opportunity shall in God's good Providence be offered, to secure the performance of this duty agreeably to the Scriptures, and in implement of the statutes of the Kingdom of Scotland, and the obligations of the Treaty of Union as understood by us and our ancestors, but acknowledging that we do not hold ourselves at liberty to retain the benefits of the establishment while we cannot comply with the conditions now to be deemed thereto attached—We Protest, that, in the circumstances in which we are placed, it is and shall be lawful for us, and such other Commissioners chosen to the Assembly appointed to have been this day holden as may concur with us, to withdraw to a separate place of meeting, for the purpose of taking steps for ourselves and all who adhere to us—maintaining with us the Confession of Faith and Standards of the Church of Scotland, as heretofore understood—for separating in an orderly way from the Establishment; and thereupon adopting such measures as may be competent to us in humble dependence on God's Grace and the aid of the Holy Spirit, for the advancement of His Glory."

APPENDIX H.

MODEL TRUST DEED.

DISPOSITION by JOHN HAMILTON, Esq., Advocate, and others, in favour of JOHN CADELL, Esq., Advocate, and others, Trustees for the Congregation of St. George's Free Church, Edinburgh. Dated 9th, 11th, and 12th November, and registered in Books of Council and Session 13th November 1844.

AND FURTHER, CONSIDERING that a Resolution of the said Deacons' Court has been duly intimated to us, authorizing and requiring us, as a majority and more than a quorum of the Building Committee foresaid, to Dispone and Convey the subjects after described, on the narrative, to the parties, and under

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the trusts, conditions, provisions, and declarations after written. THAT IS TO SAY, CONSIDERING, that WHEREAS in the year 1560, and from that year downwards, a Reformed Presbyterian Church existed in Scotland, professing to be reformed from Popery by Presbyters exercising the functions of a Church of Christ within these realms, and, in particular, adopting and approving of a Confession of Faith and two Books of Discipline, still extant, under these titles: AND WHEREAS the said Reformed Presbyterian Church continued to exist in Scotland in the year 1690, having a government by Kirk-Sessions, Presbyteries, Provincial Synods, and General Assemblies, which Church had been at different periods between the years 1567 and 1592, and the said year 1690, recognised and endowed by the State as the Established Church of the kingdom, but was then, in said year 1690, and had been for many years immediately preceding, unacknowledged by the State, and existing independent of State support: AND WHEREAS in the said year 1690 an Act was passed in the Parliament of Scotland, viz., the Act of the Second Session of the First Parliament of William and Mary, chapter 5, whereby the said Church was again recognised and endowed by the State as the Established Church of the kingdom, and not only its foresaid government by Kirk-Sessions, Presbyteries, Provincial Synods, and General Assemblies, was ratified and confirmed, and its ministers declared to have right to the maintenance, rights, and other privileges by law provided to the ministers of Christ's Church within the kingdom, but also its Confession of Faith, which it had adopted in the year 1647, and of which a verbatim copy is annexed to the said Act, was thereby ratified and established: AND WHEREAS the said Church, using, as before, its said mode of government by Kirk-Sessions, Presbyteries, Provincial Synods, and General Assemblies, continued, from and after the date of the said Act of Parliament, as long previous to that Act, to have the existence in Scotland as a Church of Christ, and was, from the date of the said Act, down to month of May 1843 years, and during the whole intermediate period, recognised and endowed by the State as the Established Church of Scotland: AND WHEREAS it was at all times an essential doctrine of the said Church, and a fundamental principle in its constitution, as set forth, in accordance with the Word of God, in the said Confession of Faith, that "there is no other Head of the Church but the Lord Jesus Christ," and that "the Lord Jesus, as King and Head of His Church, hath therein appointed a government in the hands of church officers, distinct from the civil magistrate," which government thus appointed by the Lord Jesus in the hands of church officers, distinct from the civil magistrate or supreme power of the State, and flowing directly from the head of the Church to the office-bearers thereof, to the exclusion of the civil magistrate, comprehends, as the object of it, the preaching of the Word, administration of the Sacraments, correction of manners, the admission of office-bearers of the Church to their offices, their suspension and deprivation therefrom, the infliction and removal of church censures, and generally, the whole power of "the keys," which, by the said Confession of Faith, is declared, in conformity with Scripture, to have been "committed" to church officers, and which, as well as the preaching of the Word and the administration of the Sacraments, it is likewise thereby declared, that 'the civil magistrate may not assume to himself': AND WHEREAS, further, it was at all times a fundamental principle of the said Church that no pastor should be intruded upon any congregation

contrary to the will of the people: AND WHEREAS, in the year 1834, the General Assembly of the said Church, convened at Edinburgh, passed, on 31st May 1834 years, an Overture and Interim Act, intituled "Overture and Interim Act on Calls," and on the 2nd of June 1834 years, passed a relative "Overture with Regulations for carrying the above Act into effect," whereby the said fundamental principle, that no pastor be intruded upon any congregation, contrary to the will of the people, was, as in previous Acts of the General Assembly of the said Church, distinctly declared, and was appointed to be given effect to as therein mentioned; and, because by an Act of the General Assembly of the said Church, passed on the 8th of January 1697 years, intituled an "Act anent the method of passing Acts of Assembly of general concern for the Church, and for preventing of Innovations," which is commonly called the "Barrier Act," the said General Assembly did "appoint, enact, and declare, that, before any General Assembly of this Church shall pass any Acts which are to be binding Rules and Constitutions to the Church, the same Acts be first proposed as Overtures to the Assembly, and being by them passed as such, be remitted to the consideration of the several Presbyteries of this Church, and their consent reported by their Commissioners to the next General Assembly following, who may then pass the same Acts, if the more general opinion of the Church, thus had, agree thereunto," therefore the said "Overture and Interim Act on Calls," and also the said "Overture with Regulations for carrying the above Act into effect," were, by the said General Assembly, in conformity with the said Barrier Act, remitted to the consideration of the several Presbyteries of the said Church, and the opinions and consent of the said Presbyteries having been reported by their Commissioners to the next General Assembly of the said Church, which was holden at Edinburgh in May 1835, the said next General Assembly, finding that the more general opinion of the Church, thus had, agree thereunto, did on 29th May 1835 pass the said Overture and Interim Act, under the title of an "Act on the calling of Ministers," into a standing law of the said Church, and for carrying the said last-mentioned Act into effect they, on 1st June 1835, passed an Overture and Interim Act, intituled "Overture and Interim Act, with Regulations for carrying into effect the Act of Assembly on the calling of Ministers": AND WHEREAS the General Assembly of the said Church, holden at Edinburgh in May 1838, passed on 23rd May 1838, in reference to the essential doctrine and fundamental principle first above mentioned, a formal Resolution in the following terms [see post, p. 632, and proceeds to give the history of the Disruption] . . . . AND WHEREAS the said Ministers and Elders, and those who adhere to them, thus form a body of Christians, known by the name of "The Free Church of Scotland," separate and distinct from the Established Church, as now recognised and endowed by the State; but using and exercising the foresaid form of Church Government by Kirk-Sessions, Presbyteries, Provincial Synods, and General Assemblies, and, in general, the same internal government, jurisdiction, and discipline, as before their said Act of Separation from the Church of Scotland, as now recognised and endowed by the State: AND WHEREAS, in order to secure and invest the foresaid subjects and others, and buildings erected on the ground thereof, in connection with the said Free Church of Scotland, it has been agreed to convey the same to the parties after named and

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designed, as Trustees in manner and to the effect following: THEREFORE, we, Dispone, &c. . . . *First*, UPON TRUST, that the building, or place of worship, erected, or in the course of being erected, upon the ground hereby disponed, or any building or place of worship that may hereafter be built and be erected thereon, with the appurtenances thereof, shall, in all time coming, be used, occupied, and enjoyed, as and for a place of religious worship, by a congregation of the said body of Christians called the Free Church of Scotland, or of any united body of Christians composed of them, and of such other body or bodies of Christians as the said Free Church of Scotland may at any time hereafter associate with themselves, under the foresaid name of the Free Church of Scotland, or under whatever name or designation they may assume, and to be made use of by such congregation occupying and enjoying the same, for the time being, in the way and manner in which, by the usages of the said body, or united body of Christians, places of religious worship may be, or are in use, to be occupied and enjoyed:— . . . . *Fourthly*, UPON FURTHER TRUST, That the said Trustees, or Trustee, acting for the time, shall, at all times, be subject, in the management and disposal of the said building, or place of worship, and appurtenances thereof, and whole subjects hereby disponed, and in all matters and things connected therewith, to the regulation and direction of the General Assembly, for the time being, of the said body, or united body of Christians, and shall be liable and bound to conform to, implement, and obey, all, and every, the Act, or Acts, of the General Assembly, for the time being, of the said body, or united body, of Christians, in reference thereto; and the Moderator and Clerk of the said General Assembly, for the time being, or of the then immediately preceding General Assembly of the said body, or united body, of Christians, or the parties generally known, or understood, to hold those offices for the time, shall, at all times, have full power, and sufficient status, and right and interest, to pursue, or defend, any action, or actions, in whatever court, or courts, of law or justice, for the enforcement, maintenance, or protection, of the rights, interests, or privileges of the said body, or united body, of Christians, or General Assembly thereof, in, or in any way connected with the subjects hereby disponed, and building, or place of worship, erected, or to be erected, thereon, and appurtenances thereof:— . . . . *Seventhly*, It is hereby also expressly PROVIDED and DECLARED, that it shall, at all times, be in the power of any Trustees, or Trustee, whether hereby named, or that may be appointed in virtue of the powers and provisions hereinafter contained, who may have acted in the said trust, to resign the Trusteeship; and that, in the event of any Trustees, or Trustee, whether named or to be appointed, as said is, ceasing to be members of the said body, or united body, of Christians, then, and in that case, such Trustees, or Trustee, shall, ipso facto, cease to have any right to act under these presents, and the trust shall be thenceforward conducted by the other Trustees as if such Trustees, or Trustee, ceasing as said is, were actually dead:— . . . . *Ninthly*, It is hereby specially PROVIDED and DECLARED, that if, at any time hereafter, one-third of the whole ordained Ministers, having the charge of congregations, of the said body, or united body, of Christians, or any larger number of the said ordained Ministers, having charge, as aforesaid, shall simultaneously, or within a consecutive period, not exceeding three calendar months, not only publicly separate from the said body, or united body, of Christians, but, at the same time, publicly claim and profess to hold,

truly, and in bonâ fide, the principles of the Protest of 18th May, 1843, hereinbefore recited, and to be carrying out the objects of the said Protest more faithfully than the majority of the Ministers of the said body, or united body of Christians, and shall unite in forming one body of Christians, having Kirk-Sessions, Presbyteries, Provincial Synods, and a General Assembly, then and in that case, and anything herein to the contrary notwithstanding, it shall be competent to, and in the power of, a majority of the congregation, in the use, occupation, and enjoyment of the said building, or place of worship for the time to provide and declare, by a deed of declaration and appointment under their hands, to that effect, duly executed, that the ground hereby disponed, and building, or place of worship, then upon the same, shall, from thenceforward, be held as in connection with the body of Christians adhering to the Ministers who shall have separated as aforesaid, and, for this purpose, to require and appoint the said Trustees, or Trustee, acting under these presents for the time, to convey and dispone the ground hereby disponed, and the building, or place of worship, then upon the same, and whole appurtenances thereof, to any three or more Trustees in the said deed of declaration and appointment named, to be held by such new trustees, and their successors, in trust, as after mentioned: And, on such deed of declaration and appointment being executed, as said is, the Trustees, or Trustee, acting under these presents for the time, shall be bound and obliged, as they are hereby bound and obliged, at the expense always of the receivers, and on being entirely freed and relieved of all pecuniary obligations then affecting the subjects hereby disponed, or buildings thereon, or affecting them as Trustees, or Trustee, under these presents, or for or to which they, as such Trustees, or Trustee, may be subject or liable, but no sooner, or otherwise to convey and dispone the ground hereby disponed, and the building, or place of worship, then upon the same, and whole appurtenances thereof, to the said new Trustees who shall be in the said deed of declaration and appointment named, and their successors in trust, for the said persons, subscribers of the said deed of declaration and appointment, as a congregation of the said body of Christians who shall have separated as aforesaid, and for the successors of such persons forming such congregation for the time being; such new deed of trust to be mutatis mutandis, as nearly as possible, in the terms, and of the import, of these presents, and to have for its object the placing the said congregation of the said body of Christians who shall have separated as aforesaid, and the Minister of such congregation, and the Elders and Deacons, and Elders acting as Deacons thereof, and the said body of Christians who shall have separated as aforesaid, and its Kirk-Sessions, Presbyteries, Provincial Synods, and General Assembly, and the said new trustees themselves, in the same relation respectively to the ground hereby disponed, and buildings thereon, and appurtenances thereof, and in the same relation to each other, in reference thereto, as was held, before the granting of the said new deed of trust by the congregation using, occupying, and enjoying the same, in virtue of these presents, and the Minister of such former congregation, and the Elders and Deacons, and Elders acting as Deacons thereof, and the said original body, or united body, of Christians, and its Kirk-Sessions, Presbyteries, Provincial Synods, and General Assemblies, and the said Trustees, or Trustee, acting under these presents:—*Tenthly*, It is hereby expressly PROVIDED and DECLARED that, in the event of a deed of declaration and appointment, and

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new deed of trust, being executed as aforesaid, the parties signing such deed of declaration and appointment, shall be subject and liable to pay and make good to the minority of the congregation with whom they were previously connected, who did not sign the said deed, and for behoof of the said body, or united body, of Christians, with which also they were previously connected, a proportion of the net value of the subjects disponed by such new deed of trust, corresponding to the number of such minority, as compared with the number of subscribers to said deed of declaration and appointment.

APPENDIX I.

ACT and DECLARATION anent the Publication of the Subordinate Standards and other Authoritative Documents of the Free Church of Scotland.

31st day of May, 1851.

Inter alia,

The General Assembly, on considering the Report of the Committee to which this matter was referred at a previous diet, unanimously agreed to sanction, as they hereby sanction, the publication of a volume, containing the subordinate standards, and other authoritative documents of this Church.

When it pleased Almighty God, in His great and undeserved mercy, to reform this Church from Popery by presbyters, it was given to the Reformers, amid many troubles, to construct and model the constitution of the Church, in doctrine, worship, discipline, and government, according to the Word of God, and not according to the will of earthly rulers. Our fathers, accordingly, in singleness of eye and simplicity of heart, without regard to the favour or the fear of man, so applied themselves to the work to which they were called, that they were enabled, with remarkable unanimity, to settle it upon the basis which, by the blessing of God, has continued unaltered down to the present time.

Of this settlement, besides that profession of the evangelical faith which is common to all the Churches of the Reformation, the peculiar and essential features are: I. The government of the Church by presbyters alone, or by that order of men which is indicated in the New Testament indiscriminately by the terms presbyters and bishops or overseers—πρεσβυτεροι and ἐπισκοποι—and II. The subjection of the Church, in all things spiritual, to Christ as her only Head, and to His Word as her only rule.

From the beginning these principles have been held as fundamental by the Reformed Church of Scotland; and as such they were recognised in her earliest standards—the First and Second Books of Discipline—adopted by her own independent authority, before the full sanction either of the Crown or of the Parliament was given to the Reformation which God had accomplished on her behalf. For these principles, the ministers and members of this Church, as well as the nobles, gentlemen, and burgesses of the land, from the first united in contending; and on more than one occasion, in the course of these early struggles—as in 1580, when the National Covenant was signed—our reforming ancestors bound themselves one to another, as in the sight of God, to maintain and defend them against all adversaries.

Farther: while this Church has ever held that she possesses an independent and exclusive jurisdiction or power in all ecclesiastical matters, "which flows directly from God, and the Mediator, Jesus Christ, and is spiritual, not having a temporal head on earth, but only Christ, the only King and Governor of His Church"; she has, at the same time, always strenuously advocated the doctrine taught in Holy Scripture—that nations and their rulers are bound to own the truth of God, and to advance the kingdom of His Son. And accordingly, with unfeigned thankfulness, did she acknowledge the good hand of the Lord, when, after prolonged contests with the enemies of the Reformation—and, in particular, with certain parties who sought not only to uphold a form of Prelatic government in the Church, but to establish the supremacy of the Crown in all causes, spiritual and ecclesiastical, as well as civil and temporal—a national recognition and solemn sanction of her constitution, as it had been settled by her own authority, according to the Word of God, was at last obtained;—first, in the Act of Parliament, 1567, and again, more completely, in the Act of Parliament, 1592—then and since regarded by her as the great constitutional charter of her Presbyterian government and freedom.

Thus the first Reformation was accomplished.

But before a generation had elapsed, a sad change for the worse took place. Through defection in the Church, and tyrannical invasion of her independence by the civil power, the Presbyterian polity and government were overturned, and manifold abuses and corruptions in discipline and worship were insidiously introduced. A second Reformation accordingly became necessary.

And here, again, it pleased Almighty God, as in that former Reformation of the Church from Popery by presbyters, to give to our fathers light and grace; so that, taking His Word as their only rule, and owning His Son as their only King in Zion, they were enabled not only to restore the constitution of the Church as it had stood when her first Reformation seemed to be completed, but to aim, also, at carrying out more fully the great essential principles of that constitution, and securing more effectually than before the prevalence of these principles over all the land, as well as their permanency through all coming ages . . . .

Thereafter, for the better prosecution of the work on hand, and in the face of the manifest purpose of the king and his adherents to crush it altogether, this Church, by commissioners duly named by the General Assembly, took part in the Assembly of Divines which met at Westminster in 1643. And having in view the uniformity contemplated in the Solemn League and Covenant, she consented to adopt the Confession of Faith, Catechisms, Directory for Public Worship, and form of Church Government, agreed upon by the said Assembly of Divines.

These several formularies, as ratified, with certain explanations, by divers Acts of Assembly in the years 1645, 1646, and particularly in 1647, this Church continues till this day to acknowledge as her subordinate standards of doctrine, worship, and government; with this difference, however, as regards the authority ascribed to them, that while the Confession of Faith contains the creed to which, as to a confession of his own faith, every office-bearer in the Church must testify in solemn form his personal adherence—and while the catechisms, Larger and Shorter, are sanctioned as directories for catechising; the Directory for Public Worship, the Form of Church Government, and the

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Directory for Family Worship, are of the nature of regulations, rather than of tests, to be enforced by the Church like her other laws, but not to be imposed by subscription upon her ministers and elders. These documents, then, together with a practical application of the doctrine of the Confession, in the Sum of Saving Knowledge—a valuable treatise, which, though without any express Act of Assembly, has for ages had its place among them—have, ever since the era of the second Reformation, constituted the authorized and authoritative symbolic books of the Church of Scotland.

Thus, for instance, in the civil sanction then given to Presbytery, the Parliament of 1690, overlooking altogether the higher attainments of the second Reformation, went back at once to the Act 1592, and based its legislation upon that Act alone, as being the original charter of the Presbyterian Establishment. Accordingly, it left unrepealed the infamous "Act Recissory" of King Charles by which all that the Church had done, and all that the State had done for her, in the interval between 1638 and the Restoration, had been stigmatised as treasonable and rebellious. Thus the Revolution Settlement failed in adequately acknowledging the Lord's work. . . .

For it would be in a high degree ungrateful to overlook the signal and seasonable benefits which the Revolution Settlement really did confer upon the Church, as well as upon the nation. Not only did it put an end to the cruel persecution by which the best blood of Scotland had been shed in the field, on the hillside, and on the scaffold; not only did it reinstate in their several parishes the pastors who had been unrighteously cast out in the reign of the second Charles, and set up again the platform of the Presbyterian government; but by reviving and re-enacting the Statute of 1592, the original charter and foundation of Presbytery, it recognised as an inalienable part of the constitution of this country the establishment of the Presbyterian Church. It secured also effectually, as was then universally believed, the exclusive spiritual jurisdiction of the Church, and her independence in spiritual matters of all civil control. And by the arrangements which it sanctioned for the filling up of vacant charges, it abolished those rights of patronage which had been reserved in 1592, and made provision for enforcing the fundamental principle of this Church, that "no pastor shall be intruded into a congregation contrary to the will of the people."

Among other tokens for good, as the Church humbly considered them, it may be mentioned as one of the most gratifying, that a beginning was made, during this reforming period, of the work of reunion among the true-hearted branches of the Presbyterian Church in Scotland. Overtures towards a junction with the Church of Scotland having been made by a highly esteemed body of those whose fathers had seceded from it, and ample deliberation having taken place on both sides, the end in view was happily and harmoniously attained in the year 1839, when the General Assembly, with the consent of the Presbyteries of the Church, passed an Act to the following effect:—

"Whereas proposals have been made by the Associate Synod for a reunion with the Church of Scotland, and a considerable number of overtures have been sent at the same time to the General Assembly from the Synods and Presbyteries of the Church favourable to that object; and it has been ascertained by a committee of the General Assembly, that the course of study required for a long time past of students in divinity in connection with said Synod is

quite satisfactory, and that their ministers and elders do firmly adhere to the Westminster Confession of Faith, the Larger and Shorter Catechisms, and other standards of our Church: and whereas the members of the Associate Synod do heartily concur with us in holding the great principle of an ecclesiastical establishment, and the duty of acknowledging God in our national as well as our individual capacity; and we, on the other hand, do heartily concur with the members of the Associate Synod in confessing the great obligation under which we lie to our forefathers in the year 1638, and several years of that century immediately following, and the duty, in particular circumstances, of uniting together in public solemn engagement in defence of the Church, and its doctrine, discipline, and form of worship and government: and whereas our brethren of the Associate Synod have declared their willingness, in the event of a reunion, to submit to all the laws and judicatories of this Church, reserving only to themselves the right which the members of the Established Church enjoy of endeavouring to correct, in a lawful manner, what may appear to them to be faulty in its constitution and government,—the General Assembly, with the consent of the Presbyteries of this Church, enact and ordain, that all the ministers of the Associate Synod, and their congregations in Scotland, desirous of being admitted into connection and full communion with the Church of Scotland, be received accordingly."

This step was hailed with lively satisfaction by the supporters of the old hereditary principles of the Scottish Reformation, as not only a testimony to the returning faithfulness with which these principles were now maintained, but a pledge and presage also of other movements of a similar kind which might be expected to follow, as the work of reformation and revival went on: thus holding out the hope of this Church being honoured to be successful in healing the breaches of Zion as well as rebuilding the walls of Jerusalem. . . .

[It then referred to the Disruption, and proceeded.] All along, indeed, while the contendings of this third Reformation period were going forward, not only did "they that feared the Lord speak often one to another," but most solemn consultations of the brethren were held at every step, with much earnest prayer, and many affecting pledges of mutual fidelity to one another, and to God. And as the crisis manifestly drew near, the whole body of those ministers of this Church by whom the contest was maintained met together in convocation, in November, 1842, being convened by a large number of the fathers of the Church, and, after a sermon preached by the late lamented Dr. Chalmers, continued in deliberation for several successive days, spending a large portion of the time in united supplication for the guidance and grace of God; and did not separate till, with one mind and one heart, they were enabled to announce, in resolutions having, in the circumstances, all the force of the most impressive vows and obligations, their final purpose, at all hazards, to maintain uncompromised the spiritual liberty and jurisdiction of this Church. And this they resolved to do, not by prolonged resistance to the civil courts, should the Crown and Parliament of Great Britain refuse the redress craved in the above-mentioned Claim of Rights, but by publicly renouncing the benefits of the National Establishment,—under protest that it is her being Free, and not her being Established, that constitutes the real historical and hereditary identity of the Reformed National Church of Scotland.

Holding firmly to the last, as she holds still, and, through God's grace, will

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ever hold, that it is the duty of civil rulers to recognise the truth of God, according to His Word, and to promote and support the kingdom of Christ, without assuming any jurisdiction in it, or any power over it; and deeply sensible, moreover, of the advantages resulting to the community at large, and especially to its most destitute portions, from the public endowment of pastoral charges among them: this Church could not contemplate without anxiety and alarm the prospect of losing, for herself, important means of general usefulness—leaving the whole machinery of the Establishment in the hands of parties who could retain it only by the sacrifice of her fundamental principles—and seeing large masses of the people deprived of the advantage of having the services of a gospel ministry provided for them independently of their own resources. But her path was made plain before her. . . .

5. EXTRACT from "THE SUM OF SAVING KNOWLEDGE."

HEAD III.

The outward means appointed to make the elect partakers of this covenant, and all the rest that are called, to be inexcusable. Matt. xxii. 14. Many are called.

I. The outward means and ordinances, for making men partakers of the covenant of grace, are so wisely dispensed, as that the elect shall be infallibly converted and saved by them; and the reprobate, among whom they are, not to be justly stumbled. The means are especially these four. 1. The word of God. 2. The sacraments. 3. Kirk-government. 4. Prayer. In the word of God preached by sent messengers, the Lord makes offer of grace to all sinners, upon condition of faith in Jesus Christ; and whosoever do confess their sin, accept of Christ offered, and submit themselves to his ordinances, he will have both them and their children received into the honour and privileges of the covenant of grace. . . .

Here (after setting down the precious ransom of our redemption by the sufferings of Christ, and the rich blessings purchased to us thereby, in the two former chapters), the Lord, in this chapter,

1. Maketh open offer of Christ and his grace, by proclamation of a free and gracious market of righteousness and salvation, to be had through Christ to every soul, without exception, that truly desires to be saved from sin and wrath: "Ho, every one that thirsteth," saith he.

2. He inviteth all sinners, that for any reason stand at a distance from God, to come and take from him riches of grace, running in Christ as a river, to wash away sin, and to slocken wrath: "Come ye to the waters," saith he. . . .

APPENDIX J.

BASIS OF UNION, adopted May, 1847.

1. That the word of God contained in the Scriptures of the Old and New Testaments is the only rule of Faith and Practice.

2. That the Westminster Confession of Faith and the Larger and Shorter Catechisms are the confession and catechisms of this Church, and contain the authorized exhibition of the sense in which we understand the Holy Scriptures;

it being always understood that we do not approve of anything in these documents which teaches, or may be supposed to teach, compulsory or persecuting and intolerant principles in religion."

. . . . . .

10. That the respective bodies of which this Church is composed, without requiring from each other any approval of the steps of procedure by their fathers, or interfering with the rights of private judgment in reference to these, unite in regarding as still valid the reasons of which they have hitherto maintained their state of secession and separation from the Judicatories of the Established Church, as expressed in the authorized documents of the respective bodies, and in maintaining the lawfulness and obligation of separation from ecclesiastical bodies in which dangerous error is tolerated, or the discipline of the Church or the rights of her ministers or members are disregarded.

APPENDIX K.

EXCERPT from RULES and FORMS of PROCEDURE of the UNITED PRESBYTERIAN CHURCH (1848).

After a narrative which says rules must be framed for the guidance of their office-bearers, it continued:—

"XV.—The Church is a spiritual community which has received from Christ, her Head, and holds within herself, all the power that is necessary for the administration of her affairs. She is entirely distinct from civil governments, and requires nothing from them but that civil protection to which all her members in their civil capacity are fully entitled. She addresses herself to the consciences and hearts of men, disclaiming all compulsory power over their persons or property, and the right of private judgment in all matters which relate to religion is universal and inalienable. This book of Rules and Forms is to be looked upon as shewing how the instructions given in the Word of God are reduced to practice in the government of the United Presbyterian Church. These forms are to be viewed in no other light than as the guards of substantial justice, in applying the principles already specified to the actual business of the Church.

"CHAP. II. SECT. IX.—SUB-SECT. II.

"Every minister of the United Presbyterian Church is bound to submit in the matter of temporal support, as in all other matters connected with his office, to the decision of Presbytery or Synod, and has no right to prosecute for stipend in the civil courts, it being a principle recognised in the Church that the high and sacred claim which Christ has given ministers on the consciences of their people for suitable maintenance is a security perfectly adequate, and excludes any appeal to a civil court for its enforcement."

"CHAP. V. SECT. II.—OVERTURES.

. . . . . .

"4. Any proposal which involves a change in the constitution of the Church ought to be leisurely and carefully considered If the Synod first approve

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of the proposal, it is then transmitted in the form of an Overture to the Presbyteries of the Church for their opinion, and the opinion of their sessions."

FORMULA for MINISTERS at Ordination in the UNITED PRESBYTERIAN CHURCH.

. . . . . .

"2. Do you acknowledge the Westminster Confession of Faith, and the Larger and Shorter Catechisms, as an exhibition of the sense in which you understand the Holy Scriptures. [*Note.*—After the Declaratory Act of 1879 the second part of this Formula was altered from this point to 'This acknowledgment being made in view of the explanations contained in the Declaratory Act of Synod thereanent']; it being understood that you are not required to approve of anything in these documents which teaches, or is supposed to teach, compulsory or persecuting and intolerant principles in religion?

"3. Are you persuaded that the Lord Jesus Christ, the only King and Head of the Church, has therein appointed a government distinct from, and not subordinate to, civil government? And do you acknowledge the Presbyterian form of government, as authorized and acted on in this Church, to be founded on, and agreeable to, the Word of God?

"Do you approve of the Constitution of the United Presbyterian Church as exhibited in the Basis of Union; and, while cherishing a spirit of brotherhood towards all the faithful followers of Christ, do you engage to seek the purity, edification, peace, and extension of this Church?"

APPENDIX L.

INTERIM REPORT (1864) of the Committee on Union appointed by the General Assembly of the Free Church of Scotland in 1863.

"The Committee of the Free Church and the Committee of the United Presbyterian Church have been engaged in considering the question of the relation of the Civil Magistrate to Religion and the Church.

"I. With reference to that question, the following are the Articles of Agreement between the two Committees:—

"I. That Civil Government is an ordinance of God for His own glory and the public good; that to the Lord Jesus Christ is given all power in heaven and on earth; and that Magistrates as well as other men are under obligation to submit themselves to Him, and to regulate their conduct, in their several places and relations, by His Word.

"II. That the Civil Magistrate ought to further the interests of the religion of the Lord Jesus Christ among his subjects, in every way consistent with its spirit and enactments; and to be ruled by it in the making of laws, the administration of justice, the swearing of oaths, and other matters of civil jurisdiction.

"III. That, while it is the duty of the Civil Magistrate to embrace and profess the Christian religion, it is not his province to impose a creed or a form of worship upon his subjects, or to interfere with that government which the Lord Jesus Christ has appointed in His Church, in the hands of Church

Officers—it being the exclusive prerogative of the Lord Jesus to rule in matters of faith and worship; and that the Civil Magistrate is not to further the interests of religion by means inconsistent with its spirit and enactments, which disclaim and prohibit all persecution. . . ."

"II. With reference to the same question, the following are statements in parallel columns of distinctive principles about which the two Committees differ:—

"STATEMENTS OF FREE CHURCH COMMITTEE.	"STATEMENTS OF UNITED PRESBYTERIAN CHURCH.
"I. That while the Civil Magistrate must not so sustain himself a public judge of true or false religion as to dictate to his subjects in matters of faith, and has no authority in spiritual things, yet, owning obligation to Christ, he may lawfully acknowledge as being in accordance with the Word of God, the creed and jurisdiction of the Church.	"I. That inasmuch as the Civil Magistrate has no authority in spiritual things, and as the employment of force in such matters is opposed to the spirit and precepts of Christianity, it is not within his province to legislate as to what is true in religion; to prescribe a creed or form of worship to his subjects, or to endow the Church from national resources; that Jesus Christ, as sole King and Head of His Church, has enjoined upon His people to provide for maintaining and extending it by free-will offerings; that this, being Christ's ordinance, it excludes State aid for these purposes; and that adherence to it is the true safeguard of the Church's independence.
"As a further act of homage to Christ, it is his duty, when necessary or expedient, to employ the national resources in aid of the Church, provided always that in doing so, while reserving to himself full control over the temporalities, which are his own gift, he abstain from all authoritative interference in the internal government of the Church. And while the Church must ever maintain the essential and perpetual obligation which Christ has laid on all His people to support and extend His Church by free-will offerings; yet in entire consistency with said obligation, the Church may lawfully accept aid from the civil magistrate when her spiritual independence is preserved entire. But it must always be a question to be judged of according to times and circumstances, whether or not such aid ought to be given by the civil magistrate, as well as whether or not it ought to be accepted by the Church. And the question must in every instance be decided by each of the two parties judging for itself, on its own responsibility.	

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"II. It follows from the preceding articles that any branch of the Christian Church consenting to be in alliance with the State, and to accept its aid, upon the condition of being subject to the authoritative control of the State or its Courts in spiritual matters—or continuing in such connection with the State as involves such subjection—must be held to be so far unfaithful to the Lord Jesus Christ as King and Head of His Church. And upon this ground, in accordance with the history and the constitutional principles of the Church of Scotland, a protest is to be maintained against the present Establishment in Scotland.

"II. That the United Presbyterian Church, without requiring from her members any approval of the steps of procedure by their fathers, or interfering with the rights of private judgment in reference to them, are united in regarding as still valid the reasons on which they have hitherto maintained their state of secession and separation from the judicatories of the Established Church, as expressed in the authorized documents of the respective bodies of which the United Presbyterian Church is formed; and in maintaining the lawfulness and obligation of separation from ecclesiastical bodies in which dangerous error is tolerated, or the discipline of the Church, or the rights of her ministry or members are disregarded.

"Moreover, though uniformity of opinion with respect to civil establishments of religion is not a term of communion in the United Presbyterian Church, yet the views on this subject held, and universally acted on, are opposed to these institutions; and the statements set forth in these distinctive articles are regarded by that Church as a protest against the Church Establishment in Scotland.

APPENDIX M.

OVERTURE TO BE TRANSMITTED TO PRESBYTERIES FOR THEIR OPINION.

Anent Union with the United Presbyterian Church.

"Whereas negotiations for an incorporating Union between this Church and the United Presbyterian Church have been in progress since the year 1896, as more particularly set forth in the preamble of a Uniting Act, the tenor whereof follows; and whereas the General Assembly at its meeting in the month of May 1900 has, with consent of a majority of Presbyteries, authorized and accepted the plan of Union set forth in proposals submitted by the Joint Union Committee as a plan to come into operation as soon as a Uniting Act shall have been duly passed, it being understood that the united Church shall have such common designation as may be agreed upon, and that secondary details may be adjusted as to the General Assembly may seem meet; and whereas the Synod of the United Presbyterian Church at its meeting in May

1900 has given effect to the agreement proposed by all action competent at that stage:

"Therefore the General Assembly, with consent of a majority of Presbyteries, enact and ordain as follows, viz.:—

"I. That an incorporating Union may be effected by the Assembly in terms of the Uniting Act herein set forth as follows, viz.:—

"'Whereas the Synod of the United Presbyterian Church, at its meeting in May, 1896, upon a proposal of the General Assembly of the Free Church of Scotland for closer co-operation of the two Churches in their common work, cordially approved of the proposal, and, further, adopted a resolution in favour of taking steps towards a Union with the Free Church of Scotland, and appointed a Committee, which was reappointed at the meeting of the Synod of 1897, to prosecute that object; and whereas the Free Church Assembly, having, in 1896, appointed a Committee to consider the subject, did, in 1897, reappoint the said Committee with powers to confer with the Committee of the United Presbyterian Church; and whereas these Committees having met and communicated to one another the existing doctrinal standards, rules, and methods of the two Churches, it appeared that in regard to doctrine, government, discipline, and worship therein set forth, a remarkable and happy agreement obtained between them, as also in particular in the views of the two Churches with respect to the spirituality and freedom of the Church of Christ, and her subjection to Him as her only Head, and to His Word as her supreme standard, and that an incorporating union might harmoniously be accomplished; and whereas Questions and a Formula to be used at ordination and induction, as also arrangements for the support and training of the ministry and for combining the methods and work of the two Churches, have been agreed upon, and have been considered by the inferior Courts of the two Churches—and in particular'—

[There is then set forth the plan of the union, with provision for the ministry; training thereof; aged ministers and constitution of the General Assembly.] "'. . . . and the Synod, having approved of the proposals submitted under the several heads of said Report as providing a satisfactory scheme for an incorporating Union of the two Churches, remitted them to Presbyteries . . . .' [And then the Free Church did the same.]

"'. . . . after all which the Overture proceeded: "Therefore the General Assembly, with consent of a majority of Presbyteries, hereby enact and ordain that the plan of Union set forth in the proposals hereinbefore referred to, including the rearrangement of Presbyteries and Synods as that may be approved by next or any subsequent Assembly, is authorized and accepted by this Church with a view to an incorporating Union with the United Presbyterian Church as a plan to come into operation as soon as a Uniting Act shall have been passed by the General Assembly with consent of a majority of Presbyteries of the Church, it being understood that the united Church may be declared to consist of the Free Church of Scotland as existing previously to the Union, and the United Presbyterian Church as existing previously to the Union, under such common designation as may be agreed upon; and that secondary details may be adjusted as to that Assembly may seem meet:"

"'And whereas the Synod of the United Presbyterian Church, at its meeting in May 1900, adopted the proposals which had been remitted in the

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previous year to Presbyteries and Sessions, and by them finally approved of: and further, having approved of the proposals respecting Presbyteries and Synods, and the other practical matters agreed on as necessary to complete the arrangements for entering into Union with the Free Church of Scotland, and having also approved of the proposed Uniting Act, and of certain express Declarations which the Churches have in view in entering into Union, the Synod remitted said Act and Declarations for final approval to Presbyteries and Sessions:

"'And in the like manner the General Assembly of the Free Church of Scotland, at its meeting in the same month of May 1900, approved of the proposals respecting Presbyteries and Synods as then adjusted, and passed the foresaid Overture, with the consent of a majority of Presbyteries, into a standing law; and approved of the said proposed Uniting Act, and also of the foresaid Declarations, and remitted the same in the form of an overture to Presbyteries:

"'And whereas in this month of October the General Assembly of the Free Church of Scotland, with consent of a majority of Presbyteries, and the Synod of the United Presbyterian Church, have now sanctioned the form of a Uniting Act, and also adopted the aforesaid Declarations, and having now severally passed all Acts necessary for the consummation of the Union on the terms agreed upon, having severally resolved to meet together for that purpose, and are now met accordingly:

"'Now, therefore, the said General Assembly of the Free Church of Scotland and the Synod of the United Presbyterian Church thus met, first of all desire to express their devout thankfulness to the great Head of the Church, [and so on] . . . . And the General Assembly of the Free Church of Scotland, and the Synod of the United Presbyterian Church, empowered as aforesaid, do hereby, in terms and in pursuance of the deliverances of their respective Church courts, enact and declare that the Free Church of Scotland and the United Presbyterian Church do and shall henceforth constitute one United Church; that the name of the United Church shall be The United Free Church of Scotland, and that its Supreme Court shall be designated The General Assembly of the United Free Church of Scotland.'

"II. That the General Assembly of the Free Church of Scotland and Synod of the United Presbyterian Church, when they have met for the purpose of consummating the Union, and have adopted the Uniting Act, shall thereafter have the powers of a General Assembly of the United Church. . . .

"III. That the Church enters into this Union, and authorizes it in view of the following express Declarations, viz.:—

"1. The various matters of agreement between the Churches with a view to Union are accepted and enacted without prejudice to the inherent liberty of the United Church, as a Church of Christ, to determine and regulate its own constitution and laws as duty may require, in dependence on the grace of God and under the guidance of His Word.

"2. The Larger and Shorter Catechisms of the Westminister Assembly, received and sanctioned by the General Assembly of 1648, and heretofore enumerated among the doctrinal standards of the United Presbyterian Church, continue to be received in the united Church as manuals of religious instruction long approved, and held in honour by the people of both Churches.

3. As this Union takes place on the footing of maintaining the liberty of judgment and action heretofore recognised in either of the Churches uniting, so, in particular, it is hereby declared that members of both Churches, and also of all Churches which in time past have united with either of them, shall have full right as they see cause, to assert and maintain the views of truth and duty which they had liberty to maintain in the said Churches."

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12. PREFACES to and EXTRACTS from CATECHISM by Rev. Andrew Gray, on the PRINCIPLES and CONSTITUTION of the FREE CHURCH OF SCOTLAND, issued by authority of the General Assembly, under the superintendence of the Publication Committee.

PREFATORY NOTE TO THE PRESENT EDITION.

A laudable desire exists at present in certain quarters that the true principles of the Free Church of Scotland should be emphatically proclaimed. We do not know how this can be better done than by a republication and wide circulation of the Free Church Catechism, published soon after the Disruption—a book which, unfortunately, has of late fallen into comparative obscurity and neglect. The chief author of this excellent catechism was the late able Rev. Andrew Gray of Perth, than whom no man in Scotland knew better the principles of the Free Church. The work was, however, revised by others, and received the unanimous sanction of the Free Church General Assembly of 1847, only four years after the Disruption. It was earnestly recommended to general use by that Assembly, "as containing a valuable summary of this Church's history and exhibition of her distinctive principles, from the beginning of the Reformation to the present time." Nothing has occurred since that time to make this recommendation less applicable or important; and it is hoped that all the true-hearted ministers of our Church will now avail themselves of this new opportunity of giving a wide circulation to this valuable and instructive Free Church Catechism. JAMES BEGG, D.D.

Edinburgh, *June* 1876.

At Edinburgh, the Eighth day of June, One Thousand Eight Hundred and Forty-seven Years. Session 30.

Which day the General Assembly of the Free Church of Scotland being met and duly constituted; *inter alia*,

The Assembly having resumed consideration of the overtures on the principles of the Church, agreeably to a resolution entered in their minutes at a former diet, Dr. Candlish was heard on the subject, and the following motion was unanimously agreed to:—

"The General Assembly having resumed consideration of the overtures, and of the report of the committee thereanent, and being deeply sensible of the importance of instructing the people of this church, and especially the young in the great principles which she has been called to maintain; having also had their attention called to the Catechism on the Principles and Constitution of this Church, issued in December 1845, by authority of the Publication

Committee, and since that time circulated with large acceptance in the land, and being satisfied with its soundness, as well as its suitableness to the purpose intended, approve generally of the same, as containing a valuable summary of this Church's history, and exhibition of her distinctive principles, from the beginning of the Reformation to the present time, and earnestly recommend its general use. And the Assembly authorise the Publication Committee to superintend the issue of any new edition of the Catechism that may be prepared, and to report upon it to the next General Assembly. And waiving the farther consideration of the other matters referred to in the overtures and the report as aforesaid, the Assembly appoint this Act to be read from all the pulpits on such an early Sabbath as may be agreed upon, at one or other of the ordinary diets of worship; on which occasion ministers are enjoined to preach to their people on the doctrine of the Headship of the Lord Jesus Christ as held by this Church, according to God's Word, as well as the peculiar responsibility of the Church, and of all her faithful people in regard to it."

Extracted from the records of the General Assembly of the Free Church of Scotland, by THOMAS PITCAIRN, *Cl. Ec. Scot. Lib.*

* * * * *

Division 1.—*The Church's* EXERCISE *of her Freedom to Serve Christ alone as her Head.*

Q. 231. *What Confessions of Faith were adopted by the Church of Scotland?*

A. The Old, or John Knox's Confession, which was drawn up in 1560; and the Westminster Confession, which was sanctioned by the Assembly in 1647.

Q. 232. *Did the Church adopt them freely, or were they imposed upon her by the civil power?*

A. The Church freely adopted them.

Q. 233. *Did not the State adopt them too?*

A. Yes; but it was after their adoption by the Church.

Q. 234. *When the Church substituted the Westminister Confession for that of John Knox, had the sanction of the latter by the State been withdrawn?*

A. No; the Confession of John Knox had the sanction of the State at the very time.

Q. 235. *Did the Church of Scotland always adopt such catechisms as she thought necessary and fit for the Christian instruction of the people?*

A. Always; and her catechisms sometimes had the sanction of the State, and sometimes no sanction but her own.

Q. 236. *Did she consult the will of the civil magistrate in inflicting her censures?*

A. She inflicted her censures on all offenders, both high and low, according to her sense of the will of Christ.

Q. 237. *What were her proceedings in regard to the form of her government?*

A. When she became convinced that it was not scriptural, she changed it.

Q. 238. *How often did this occur?*

A. Twice—in 1580 and 1638.

Q. 239. *What circumstance was it which made the step she took on these occasions a very striking exercise of freedom from the rule of the civil power?*

A. In both cases the form of government which she renounced and set aside had the sanction and approval of the State at the time.

Q. 240. *How did she exercise her freedom in regard to the composition of her judicatories?*

A. She at once gave effect to her fundamental principle respecting the equality of ministers, by admitting into her courts all who held the pastoral office, whether they were endowed or unendowed, and whether the charges they filled were civilly established or not.

Q. 241. *Was this all?*

A. No; by her sole appointment, ruling elders were, from the very first, made members of her judicatories along with their pastors.

Q. 242. *Did not the State* EXPRESSLY *sanction the right of ruling elders to sit in Church courts?*

A. It did; but not till the Revolution—one hundred and thirty years after the Church had admitted them.

Q. 243. *Are there any instances of this exercise of her freedom occurring subsequently to the Revolution?*

A. Yes; ordained chaplains and missionaries were received by her as members of her judicatories till about the middle of the eighteenth century; commissioners from the Scotch Church at Campvere, in Holland, sat in her General Assemblies till the breaking up of that Church by the French invasion in the days of Bonaparte; and she passed an Act in 1814, conferring on the Scotch Church in India a right of representation in her supreme court—which right has been enjoyed without interruption down to the present time.

Q. 244. *Did the State never sanction the right of Campvere or of India to be represented in the General Assembly?*

A. Never.

* * * * *

Q. 276. *Is there not a statement in the Confession of Faith, on which Erastians have fastened as favourable to their opinions?*

A. Such a statement there is in ch. xxiii. 3, which says, that "the civil magistrate hath authority, and it is his duty to take order that unity and peace be preserved in the Church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered, and observed. For the better effecting whereof, he hath power to call synods, and to be present at them, and to provide that whatsoever is transacted in them be according to the mind of God."

Q. 277. *Does this mean that the civil magistrate is himself to administer the government of the Church?*

A. Such cannot be the meaning; for that would be to assume the power of the keys, which the Confession says he must not do; and it would be inconsistent with the doctrine laid down in the Confession, "that the Lord Jesus, as King and Head of his Church, hath appointed a government therein *in the hands of church officers.*"

Q. 278. *Does it mean that the civil magistrate is to receive appeals from the decisions of the office-bearers of the Church, and finally to determine in the cases thus brought before him?*

A. Such cannot be the meaning; for then the government would be in the hands of church officers *conjointly with* the magistrate; whereas the Confession declares that it is "in the hands of church officers, *distinct from* the civil magistrate."

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Q. 279. *Does it mean that, when controversies arise, and the peace of the Church is broken by the disputes of its members and office-bearers, the magistrate is entitled to call the parties before him, to give judgment between them, and thereafter to compel the Church to proceed in conformity with his views?*

A. Such cannot be the meaning; for the Confession teaches that "there is no other Head of the Church but the Lord Jesus Christ," and it also declares that "*it belongeth to synods and councils* ministerially" (that is to say, under Christ) "to determine controversies of faith and cases of conscience, and to set down rules and directions for the better ordering of the public worship of God and government of his Church;" and in this very passage it is intimated that the magistrate cannot effectually accomplish the object it is his duty to aim at, without resorting to the authority of ecclesiastical assemblies.

Q. 280. *Does it mean that, when Church and State differ on any question of Church polity, or discipline, or Scripture principle, the State must always be held to be in the right, and it is the duty of the Church to succumb; or that, on the supposition of the State being in the right (a thing which, however, cannot be certainly known), the Church may be compelled by the civil arm to give way?*

A. In that case there *would* be another head than the Lord Jesus Christ, and there would *not* be, in any reasonable meaning of the words, a government in the Church "distinct from the civil magistrate."

Q. 281. *Does it mean that the magistrate shall make the Church obey his Acts of Parliament?*

A. No; it says expressly that he is to provide that the things done by the Church shall be "according to the mind of God."

Q. 282. *Does it mean that ecclesiastical synods cannot be held unless he is pleased to convoke them?*

A. It says nothing like that; his power to call synods, when he wishes to consult them, and to have their aid, neither excludes nor infringes on the Church's right to hold them when she thinks them necessary; as is specially shown in the Act of Assembly, 1647, by which the Confession was approved and adopted.

Q. 283. *Does it mean that he may lawfully infringe on the freedom of synodical deliberations?*

A. Such cannot be the meaning; for, in doing so, he must arrogate the power of the keys, destroy the distinction between civil and ecclesiastical government, and make himself head of the Church; and a synod acting under coercion would, in respect of character and authority, be indeed no synod at all.

Q. 284. *What, then, is the meaning of it?*

A. The meaning of it is that the magistrate hath authority, and it is his duty, in his official capacity, to concern himself about the interests of religion and the welfare of the Church; and, in such ways as are competent to him, consistently with Christ's exclusive Headship in the Church, and the rights of that government which is "distinct from the civil magistrate," namely, by his example, his influence, and his legitimate control over temporal things, to take order (not to *give* order, or command, but to *take* order, or provide) for their advancement.

* * * * *

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[PRIVY COUNCIL.]

CALGARY AND EDMONTON RAILWAY COMPANY AND ANOTHER . . . } SUPPLIANTS;

AND

THE KING . . . . . RESPONDENT.

J. C.* 1904 July 20; Aug. 5.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canadian Act (53 *Vict.* c. 4)—*Orders in Council thereunder—Construction—Grants thereunder include Mines and Minerals.*

Held, that the appellant railway company, being entitled under Canadian Act 53 Vict. c. 4 and an Order in Council made in pursuance thereof to grants of Dominion lands as a subsidy in aid of the construction of their railway, were entitled to them without any reservation by the Crown of mines and minerals except gold and silver. The Dominion Lands Act, 1886, and the Regulations of 1889 thereunder, which prescribe a reservation to that effect, do not apply. They relate only to the sale of Dominion lands and to the settlement, use, and occupation thereof. The grants in question were not by way of sale.

APPEAL from a decree of the Supreme Court (April 29, 1903) affirming by an equal division of opinion a decree of the Exchequer Court (Nov. 10, 1902).

The question decided in this appeal related to certain Dominion lands granted to the appellant railway company by way of subsidies in aid of the construction of their railway, whether these grants were subject to a reservation in favour of the Crown of mines and minerals. That depended upon whether the general law prescribed by the Lands Acts and Orders in Council made thereunder applied, or whether the special Dominion Act (53 Vict. c. 4) and special Orders in Council thereunder authorizing the grants in question in effect overrode the general law and rendered the grants free of reservation except as regards gold and silver.

Both the special and general legislation are sufficiently set out in their Lordships' judgment.

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

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Patents were issued to the appellants for some of the lands earned according to the terms of their contract with the Crown by construction of their railway. They contained the condition—"reserving unto Her Majesty, Her successors and assigns, all mines and minerals, and the right to work the same." The Minister of the Interior refused to issue patents for the remainder of the land earned except with the said reservation, claiming that the appellants were entitled only to surface rights, and that the stipulated grants were controlled by the Lands Act (Revised Statutes of Canada, c. 54), and the regulations and orders made thereunder.

On a petition of right filed in consequence of this refusal, Armour and Davies JJ. affirmed the view of the lower Court that the suit should be dismissed. They held that regulation 8 (under the heading "Sale of Dominion Lands") of the Regulations of September 17, 1889, was within the powers conferred by the Dominion Lands Act, the words of which were sufficiently wide to support it; that it was therefore the general law at the date of the Subsidy Act; that it must be assumed that the grants were made subject to the general law in relation to lands in Manitoba and the North-West Territories, and subject, therefore, to the provisions of regulation 8, and that there is nothing in the Subsidy Act, or in the Orders in Council rightly understood, shewing that these lands were not subject to the reservation provided for in the regulation 8. They thought that to construe the words in the special Act "free grants" in relation to the context in which they are found as grants free from the reservation of regulation 8 would be wholly unreasonable.

Stout C.J. and Girouard J. were in favour of reversing the decree of the Court below. They considered (1.) that the reservations as to grants to settlers contained in s. 8 of the Regulations of September, 1889, had no application to the grant to the railway company; that these regulations were made exclusively for the sale, settlement, use, and occupation of the Crown lands under the laws generally governing such sales, settlements, and occupations; and do not relate to a special parliamentary grant such as this one is;

(2.) That it cannot be assumed that the grant to the railway company was subject to the ordinary conditions and to existing regulations respecting such lands, but that the special grant to the railway company of a subsidy in lands for the construction of a railway needed in the public interest, without which it would not have been built, must be treated as subject exclusively to the special Orders in Council made in respect of such special grants;

(3.) That the contract between the Crown and the appellants could not be treated as subject to both general and special conditions: the latter must control the former;

(4.) That s. 8 of the Regulations of September, 1889, applies to patents to be issued in the ordinary course; that the appellants' title is perfect without a patent; that the patent is only evidence of the allotment; that it is a parliamentary title under a contract; that the subsequent allotment by the Department of the Interior and the Governor in Council of the particular lands so granted could not have contained any derogation from that contract expressly or impliedly.

Hellmuth, K.C., Rowlatt, and *D. W. Saunders,* for the appellants, contended that according to the plain and unambiguous meaning of 53 Vict. c. 4, s. 2, the grant to the appellants was subject only to the conditions fixed by the Order in Council, and in all other respects was a free grant. The Lands Act (Revised Statutes of Canada, c. 54), s. 48, contained a prohibition against gold and silver mines passing under a grant unless expressly conveyed thereby. That prohibition does not apply to mines and minerals generally, and there was nothing in the Act or orders specially relating to these grants which excepted them from the generality of the grants authorized. This was not a case of sale and purchase, but a special grant in aid for special consideration, and it was subject only to the special condition expressed, which superseded the general conditions prescribed by the Lands Act. They were free grants except so far as otherwise specified. The Territories Real Property Act (Revised Statutes of Canada, c. 51, s. 3), as amended by 51 Vict. c. 20, s. 2, both which Acts

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were in force at the date of the grant, were referred to as interpreting land to include mines and minerals unless specially excepted. Reference was made to *Government of Newfoundland* v. *Newfoundland Ry. Co.* (1) and *Attorney-General of British Columbia* v. *Attorney-General of Canada*. (2)

Blake, K.C., Newcombe, K.C., and *Frank Russell*, for the respondent, contended that under the general law, namely, the Dominion Public Lands Act, 1886 (Revised Statutes of Canada, c. 54), and the regulations thereunder—see especially regulation 8 of September 17, 1889—all patents for public lands must reserve to the Crown all mines and minerals therein. Consequently these grants in question as authorized by the special Act must be made subject to that reservation, as being one within the contemplation of the parties to the contract under which the grants were called for. The terms of the special Act and orders were referred to, and it was contended that these must be deemed to contemplate that reservation which the general law prescribed. As regards the expression "free grants" in the special Act, that was and is used in the Dominion land legislation as signifying lands granted without payment or money consideration, as, for example, homesteads, on which the settlement of the country was based, and grants for churches, &c., and that was its meaning in the said Act. Grants of Crown lands should be strictly construed as against the donee, and do not include mines and minerals unless they are expressed. It was contended that it was the clear understanding and intention of the Crown, communicated to the appellants before any proceeding under the special Act, that mines and minerals should not pass, as is shewn by their acquiescence in that reservation in the patents granted before suit. Reference was made to *Chappelle* v. *King*. (3)

Hellmuth, K.C., replied.

1904 Aug. 5.

The judgment of their Lordships was delivered by

LORD LINDLEY. The Calgary and Edmonton Railway Company was incorporated in April, 1890, by a Dominion Act

(1) (1888) 13 App. Cas. 199. (2) (1889) 14 App. Cas. 295.
(3) Ante, p. 127.

(53 Vict. c. 84) for the purpose of making and working a railway from Calgary to Edmonton, with an extension southerly to the boundary between Canada and the United States, and northerly to the Peace river. Shortly after its incorporation the company applied to the Minister of the Interior for a grant of Dominion lands in aid of the construction of the line, and by an Order in Council dated May 5, 1890, the Governor-General sanctioned a recommendation by the Minister that, subject to the approval of Parliament, a grant of Dominion lands should be made to the company at the usual rate of 6400 acres per mile of the line from Calgary to Edmonton, and from Calgary southerly to the international boundary, but subject to certain conditions which it is unnecessary to refer to.

By a Dominion Act (53 Vict. c. 4) passed on May 16, 1890, the Governor in Council was authorized to grant subsidies in land to several companies, including the Calgary and Edmonton Railway Company as above stated; and by s. 2 of that Act the grants were to be made upon the conditions fixed by the Orders in Council made in respect of them, and except as to such conditions the grant was to be a free grant subject to the payment of some expenses to which it is unnecessary to refer.

On May 22, 1890, the above Order in Council of May 5 was varied in some respects which are immaterial, and on June 27, 1890, another Order in Council was made cancelling the previous orders, and expressing the conditions on which the lands authorized to be granted to the company should be granted. These are set out in the record. Nothing is said about mines or minerals.

On December 26, 1890, an agreement was entered into between the Crown and the company for the construction of the railway. This agreement referred to and incorporated the terms and conditions of the above-mentioned Order in Council of June 27, 1890, and by the 8th clause it was agreed that on the completion of the line "the railway and works appertaining thereto, together with all the franchises, rights, privileges, property personal and real of every character," should be the property of the company.

There were further agreements by which the Government

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undertook to assist the company with money for the construction of the line, but nothing turns on these agreements.

The company have completed the line, and are entitled to grants of 6400 acres per mile. Several grants have been made from time to time, and in these grants the mines and minerals have been reserved to the Crown. The Government are quite ready to execute further grants provided they contain a reservation to the Crown of all mines and minerals, as is usual in Crown grants. The company, however, contend that, having regard to the special Act and the Order in Council of June 27, 1890, applicable to them, they are entitled to grants without any reservation of mines and minerals except gold and silver, as to which their Lordships understand no objection is made.

In consequence of this refusal the company presented a petition of right, which came on before Burbidge J., who decided it against the company. On appeal the Supreme Court was evenly divided, and the decision appealed from was therefore affirmed. The present appeal is by the company from these decisions.

Grants of Dominion lands are governed by the Dominion Lands Act of 1886 and by Regulations of 1889. An earlier Order in Council of October 31, 1887, printed in the record, was never duly promulgated, and it was conceded before their Lordships that this order should be disregarded.

In considering the Dominion Lands Act and the Regulations of 1889, the fact that the lands to be granted to the railway are to be granted as a subsidy, i.e., by way of bounty and not by way of sale, is all important. The enactments and regulations relating to Crown lands reserved for sale, or homesteads, have no application to the lands reserved for the totally different purpose of granting lands by way of subsidies for public works.

The Dominion Lands Act of 1886 contains provisions relating to sales and homesteads (ss. 29, 32); s. 90 (*b*) enables the Governor in Council to reserve from general sale and settlement Dominion lands to aid in the construction of railways, and to provide for the disposal of such lands (notwithstanding

anything contained in the Act) in such manner, at such time, and on such terms as he may deem expedient.

The only provisions as to mines and minerals which are important are ss. 47 and 48. Sect. 47 is to the effect that lands containing coal or other minerals shall not be subject to the provisions of the Act respecting sale or homestead entry, but shall be disposed of in such manner and on such terms and conditions as are from time to time fixed by the Governor in Council by regulations made in that behalf. Sect. 48 enacts that no grant from the Crown shall convey gold or silver mines unless they are expressly conveyed in such grant.

Turning now to the Regulations of September 17, 1889, counsel for the Crown rely on the fact that the regulations are for the sale, settlement, use, and occupation of Dominion lands, and they rely more particularly on regulation 8, which says that all patents from the Crown for lands in Manitoba and the North-West Territories shall reserve to the Crown all mines and minerals with power to work them. But general as these words are, the regulations themselves relate only to sales of Dominion lands and to the settlement, use, and occupation of such lands. The lands in question are Dominion lands until parted with, but they cease to be so when granted to the company; and none of the regulations relating to settlement, use, and occupation of Dominion lands have any bearing on the present controversy. If the grant to be made to the company was a sale—which it clearly is not—another question would arise, namely, whether the grant to the company would be regulated by the general Act and regulations, or, as the company contend, by the special Act (53 Vict. c. 4) and Order in Council of June 27, 1890, already referred to.

This was the question mainly argued in Canada, and on which the members of the Supreme Court were equally divided.

Upon this question their Lordships concur with the Chief Justice and Girouard J. in thinking that the special Act and Order in Council of June 27, 1900, are the governing documents. But it appears to their Lordships that, quite apart from the special Act and the Order of June 27, 1890, the

J.C. 1904 CALGARY RAILWAY v. REX.

Regulations of 1889 are themselves not so framed as to apply to such grants as have to be considered on the present occasion.

Their Lordships, therefore, will humbly advise His Majesty to allow the appeal and to reverse the judgments of the Canadian Courts, with costs to be paid by the respondent; and further to declare that all future patents to be issued for land to be granted to the company under the provisions of the Act 53 Vict. c. 4 and the Order in Council of June 27, 1890, are to be free from any reservation of mines or minerals except gold and silver; and so far as relates to the claim for the rectification of the patents already granted reserving the mines and minerals, the petition of right be remitted to the Exchequer Court of Canada.

The respondent must pay the costs of this appeal.

Solicitors for appellants: *Freshfields.*
Solicitors for respondent: *C. Russell & Co.*

[PRIVY COUNCIL.]

MAYOR, COUNCILLORS, AND CITIZENS OF THE CITY OF WELLINGTON . . . . . } DEFENDANTS;

AND

MAYOR, COUNCILLORS, AND BURGESSES OF THE BOROUGH OF LOWER HUTT . . . . . } PLAINTIFFS.

J. C.*
1904
July 15, 26.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand Municipal Corporations Act, 1900, *s.* 219 — *Construction— "Adjacent."*

Sect. 219 of the New Zealand Municipal Corporations Act, 1900, empowers the construction of bridges by municipal councils, and provides that in certain circumstances the local authority of an adjacent district should contribute to the cost:—

Held, that the word "adjacent" is not a word of precise and uniform meaning, and the degree of proximity denoted is a question of circumstances. The Court below having decided that the appellant city was adjacent to the respondent borough although there was a distance of over six miles between their boundaries and three other local divisions intervened, its discretion was not interfered with.

APPEAL from a judgment of the Court of Appeal on a special case stated under rule 241 of the Supreme Court Code, and removed into the Court of Appeal by order made under s. 13 of the Court of Appeal Act, 1882.

The question raised thereby was whether, under the circumstances stated in the judgment of their Lordships, the appellant borough was "adjacent" to the respondent borough within the meaning of s. 219 of the Municipal Corporations Act, 1900.

The action in which the case was stated was brought by the respondents against the appellants to recover 120*l.* 17*s.* 10*d.*, being a contribution towards the first instalment of the cost, estimated at 9000*l.*, of constructing a bridge and its approaches across the Hutt river ordered to be paid by the appellants to

* *Present:* LORD DAVEY, LORD ROBERTSON, SIR ARTHUR WILSON, and SIR HENRI TASCHEREAU.

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the respondents by the Governor of the Colony under the said section.

The Court of Appeal held (Stout C.J. and Conolly J. dissenting) that the city of Wellington was adjacent to the borough of Lower Hutt within the meaning of the section.

Asquith, K.C., and *Skerrett*, for the appellants, contended that this construction was wrong, since the city was not contiguous to the borough, nor lying near to it, and was divided therefrom by the districts of three several local authorities.

Cohen, K.C., and *Tyrrell Paine*, for the respondents, contended that the word "adjacent" as used in the section denoted nearness, and did not necessarily involve the idea of contiguity. The discretion of the lower Court ought not to be interfered with. It was not disputed that the appellants shared in the benefits of the bridge: see the Interpretation Act (No. 15 of 1888), s. 5, sub-s. 7.

Skerrett replied.

1904 *July* 26.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. The question raised by this appeal is as to the meaning of the word "adjacent" as used in s. 219 of the Municipal Corporations Act, 1900, of New Zealand. That section, omitting words unnecessary for the present purpose, says: "In any case where the council of any borough desires to construct . . . . a bridge . . . . in any position that will, in its opinion, be of advantage and benefit to the whole or any considerable portion of the inhabitants of an adjacent borough or county or other district, as well as to the inhabitants of its own district, and where it is, in the opinion of such council, reasonable that the local authority of such adjacent district should contribute to the cost," the council may in proper manner apply to the Governor, who may by warrant authorize the work to be done, "and may declare that a proportion of the cost thereof to be mentioned in such warrant shall be borne by any other local authority."

The borough of Lower Hutt proposed to construct a bridge over the Hutt river, at a point within its own boundaries, and

gave notice to the city of Wellington of its intention to apply to the Governor for power to construct the bridge, and to recover a proportion of the cost from the city of Wellington, alleging that the case fell within the section which has been cited. The city of Wellington opposed. The procedure followed in such cases was pursued, and ultimately the Governor, by warrant purporting to be issued under the section, authorized the construction of the bridge by the borough of Lower Hutt, and apportioned 20 per cent. of the cost to be borne by the city of Wellington.

The borough of Lower Hutt claimed payment of one instalment of the 20 per cent. of the cost of the bridge. The claim was resisted. A special case was stated for the opinion of the Supreme Court, which was removed by order into the Court of Appeal for argument, and so the matter came before the latter Court.

The question raised by the special case was whether the one borough concerned was adjacent to the other within the meaning of s. 219 of the Act. The relative position of the two was shewn on the map annexed. It is enough for the present purpose to say that on that map it is shewn that the city of Wellington does not immediately adjoin the borough of Lower Hutt, that there is a distance of over six miles between their boundaries, and that three other local divisions, Onslow Borough, Hutt County, and Petone Borough intervene. A majority of the learned judges answered the question raised by the case in the affirmative, holding that Wellington City is adjacent to Lower Hutt Borough within the meaning of the section. The minority of the learned judges took a stricter view of the meaning of the word "adjacent," and considered that Wellington City cannot be called "adjacent" to Lower Hutt.

This difference of opinion can give rise to no surprise, for the question is one of difficulty. "Adjacent" is not a word to which a precise and uniform meaning is attached by ordinary usage. It is not confined to places adjoining, and it includes places close to or near. What degree of proximity would justify the application of the word is entirely a question of

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circumstances. There is not much in the context or in the surrounding circumstances to throw light upon the sense in which it is employed in the present instance. It is enough for the decision of this appeal to say that their Lordships could not properly advise His Majesty to interfere with the decision appealed against unless they were clearly satisfied that the view of the majority of the learned judges as to the meaning of the section and its application to the present case was wrong, and they are far from being so satisfied.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants will pay the costs.

Solicitors for appellants: *Bowerman & Forward.*
Solicitors for respondents: *Paines, Blyth & Huxtable.*

[PRIVY COUNCIL.]

J. C.* 1904 *June* 22; *July* 15.

DAILY TELEGRAPH NEWSPAPER COMPANY, LIMITED . . . . . } DEFENDANTS;

AND

McLAUGHLIN . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Practice—Special Leave to Appeal—High Court of Australia.

An application for special leave to appeal from the High Court of Australia will be treated in the same manner as an application for special leave to appeal from the Supreme Court of Canada. It will not be entertained save where the case is of gravity involving matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character.

Prince v. *Gagnon*, (1882) 8 App. Cas. 103, followed.

Where a limited company, acting upon a deed of transfer executed through a power of attorney signed by the plaintiff whilst of unsound mind, transferred shares standing in their register in his name, their Lordships, seeing

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* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

no reason to doubt the correctness of the High Court's judgment to the effect that the power was void and the deed of transfer a nullity, declined to advise that special leave be given.

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1904
DAILY TELEGRAPH NEWSPAPER COMPANY v. MCLAUGHLIN.

THIS was a petition by the appellants for special leave, under the circumstances stated in their Lordships' judgment, to appeal from a decree of the High Court. Under ss. 73 and 74 of the Commonwealth of Australia Act, 1900, no appeal lay without special leave of His Majesty.

The grounds of appeal stated in the petition were—(1.) that the High Court was not justified in reversing the finding of the Chief Judge on the facts; (2.) that it ought not to have been found that the plaintiff's wife at the date of the power of attorney granted to her by the plaintiff knew the state of his mind; (3.) that the petitioners having had no notice of the respondent's incapacity from mental infirmity to execute the power, and having in registering the transfers of shares acted in the ordinary course of business and with perfect bona fides, were not liable to the plaintiff in respect thereof.

H. Terrell, K.C., for the petitioners.
Sargant, for the respondent.

1904
July 15.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. As this is the first instance in which application has been made for special leave to appeal to His Majesty from a decision of the High Court of Australia, their Lordships think it desirable to state the principles which in their opinion ought to guide this Board in tendering advice to His Majesty in such a case. The High Court occupies a position of great dignity and supreme authority in the Commonwealth. No appeal lies from it as of right to any tribunal in the Empire. There can be no appeal at all unless His Majesty, by virtue of his Royal prerogative, thinks fit to grant special leave to appeal to Himself in Council. In certain cases touching the constitution of the Commonwealth the Royal prerogative has been waived. In all other cases it seems to their Lordships that applications for special leave to appeal from the High Court ought to be treated in the same manner as applications for special leave to appeal from the Supreme Court of Canada,

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an equally august and independent tribunal. And their Lordships think that they cannot do better than repeat the observations which were made by Lord Watson in delivering the judgment of this Board in the case of a petition to Her late Majesty, in which the city of Montreal was the applicant: *La Cité de Montréal* v. *Les Ecclésiastiques du Séminaire de St. Sulpice de Montréal.* (1)

"It is the duty of their Lordships," said Lord Watson in that case, "to advise Her Majesty in the exercise of her prerogative, and in the discharge of that duty they are bound to apply their judicial discretion to the particular facts and circumstances of each case as presented to them. In forming an opinion as to the propriety of allowing an appeal, they must necessarily rely to a very great extent upon the statements contained in the petition with regard to the import and effect of the judgment complained of, and the reasons therein alleged for treating it as an exceptional one, and permitting it to be brought under review. Experience has shewn that great caution is required in accepting these reasons when they are not fully substantiated, or do not appear to be primâ facie established by reference to the petitioner's statement of the main facts of the case, and the questions of law to which these give rise. Cases vary so widely in their circumstances that the principles upon which an appeal ought to be allowed do not admit of anything approaching to exhaustive definition. No rule can be laid down which would not necessarily be subject to future qualification, and an attempt to formulate any such rule might therefore prove misleading. In some cases, as in *Prince* v. *Gagnon* (2), their Lordships have had occasion to indicate certain particulars, the absence of which will have a strong influence in inducing them to advise that leave should not be given, but it by no means follows that leave will be recommended in all cases in which these features occur. A case may be of a substantial character, may involve matter of great public interest, and may raise an important question of law, and yet the judgment from which leave to appeal is sought may appear to be plainly right, or at least to be unattended

(1) (1889) 14 App. Cas. 660, at p. 662. (2) 8 App. Cas. 103.

with sufficient doubt to justify their Lordships in advising Her Majesty to grant leave to appeal."

In *Prince* v. *Gagnon* (1), to which Lord Watson refers, it was stated that their Lordships were not prepared to advise Her late Majesty to exercise her prerogative by admitting an appeal to Her Majesty in Council from the Supreme Court of Canada, "save where the case is of gravity involving matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character."

In the present case the question before the High Court was a question partly of fact and partly of law. The action was brought to recover from a limited company certain shares which had formerly stood in the plaintiff's name, but had been transferred under the authority of a deed purporting to have been executed by the plaintiff by his attorney. His case was that the power of attorney, though it bore his genuine signature, was void because, at the time when his signature was obtained, he was of unsound mind and incapable of understanding what he was doing. After a careful review of the facts the High Court, differing from the judge of first instance, came to the conclusion that when the plaintiff executed the power of attorney in question "he had no knowledge of what he was doing, except that he knew that he was signing his name, which under the circumstances was, as described by Dr. Lamrock," who was his medical attendant, "a mere mechanical act." Having come to this conclusion on the facts of the case, the High Court held that the power of attorney was void and the deed of transfer a nullity. Now the petitioners, as their Lordships understand, do not propose to contest the finding of the High Court on the question of fact, nor indeed would their Lordships be disposed to advise His Majesty to admit an appeal on such a question. The petitioners, however, allege that the case involves a large sum of money, as apparently it does, and that the question is one of general interest, which may also be admitted. But their Lordships, having had the advantage of hearing argument on both sides,

(1) 8 App. Cas. 103.

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see no reason to doubt that the judgment of the High Court is right. The case of *Thompson* v. *Leach* (1), referred to in the judgment of the High Court, seems to be an authority on the point; and the case of *Elliot* v. *Ince* (2), which is also referred to in the judgment, in one of its aspects, though not the one chiefly discussed, comes very near the present case. There a lady who was tenant in tail of copyholds executed a power of attorney authorizing her attorney, first, to procure her admission as tenant in tail, and, secondly, to surrender after admission and then to take readmission in fee. She was a lunatic so found at the time of the execution of the power of attorney. All the proceedings contemplated were taken, and on the face of them appeared to be regular. It was contended after her death that she died entitled to the copyholds in fee. The Vice-Chancellor so decided. But Lord Cranworth L.C., on appeal, held that unless a lucid interval were proved she must be treated as tenant in tail. His Lordship's view was that everything depended on the validity of the power of attorney, and that, if she was of unsound mind when she executed the power of attorney, "the substratum," to use his Lordship's expression, was "removed." Now, if the power of attorney is mere waste paper, it is difficult to see how anything which rests on it as the foundation and groundwork of the whole superstructure can be of any validity, whether the transaction is beneficial to the lunatic or not. The risk to a company acting on a power of attorney is, no doubt, considerable, but the directors can protect themselves to some extent by making careful inquiries—a precaution not apparently taken in the present case. As custodians of the register they cannot expect perfect immunity. They are always exposed to the risk of forgery.

Their Lordships, therefore, are unable to advise His Majesty to grant special leave to appeal, and the petition must be dismissed with costs.

Solicitors for petitioners: *Snow, Fox & Higginson.*
Solicitors for respondent: *Young, Jones & Co.*

(1) (1690) 3 Mod. 301; Carth. 435. (2) (1857) 7 D. M. & G. 475.

[PRIVY COUNCIL.]

HESLOP . . . . . APPELLANT;

AND

THE MINISTER OF MINES FOR NEW ZEALAND . . . . . RESPONDENT.

J. C.
1904
July 22, 27; Aug. 5.

ON APPEAL FROM THE COURT OF APPEAL FOR NEW ZEALAND.

New Zealand Mining Act, 1898, *ss.* 232, 233—*Compensation—Public Works Act*, 1894, *s.* 44—*Amount must be settled by Agreement or Judicial Decision—Summary Procedure unauthorized.*

The incorporation by s. 232 of the New Zealand Mining Act, 1898, of the machinery of the Public Works Act, 1894, for ascertainment and settlement of compensation is expressly made subject to all the provisions of the incorporating Act. Where the appellant claimed compensation for lands injuriously affected by the authorized pollution of a river, and obtained judgment under the Public Works Act, s. 44, for the same, as not having been disputed by the Minister within the time prescribed thereby:—

Held, that the judgment must be set aside, because the claim, not having been settled by agreement, should have been adjudicated upon as provided by s. 233 of the Mining Act, which precludes the summary procedure of s. 44 of the earlier Act.

APPEAL from a judgment of the Court of Appeal (June 29, 1903) allowing an appeal from the order of Stout C.J. (March 31, 1903), who had dismissed a motion made by the respondent Minister to set aside a claim for compensation made by the appellant and filed by him in the Supreme Court. The Court of Appeal directed the removal of the claim, which was for compensation in respect of lands injuriously affected by reason of part of the Inangahua river being proclaimed as a watercourse, into which mining débris and waste water might be discharged.

In August, 1900, a notification under s. 109 of the Mining Act, 1898, was published relating to the watercourse, and a claim was made by the appellant for 392*l.* and rejected; the

* *Present*: LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

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proclamation was published on August 1, 1901; correspondence ensued between the appellant and the Minister; on June 2, 1902, the appellant signed a claim for 392*l.*, and served it on July 4. It was stated to have been made in one of the forms prescribed by the 2nd schedule to the Public Works Act, 1894, and no notice was given in terms of s. 44 of that Act within sixty days of service that the Minister did not admit the claim.

On December 3, 1902, the appellant filed his claim in the Supreme Court under s. 44, and contended that by virtue of that section the claim so filed had the force and effect of an award, and might be enforced in terms of s. 76 of that Act.

The Chief Justice allowed the respondent's motion to set this claim aside and declare it to be void and of no effect. He was of opinion—(1.) that under the Mining Act of 1898 two claims were necessary, one on the publication of the notice under s. 109, and the other after the proclamation had been made, and that the rejection of the former claim did not render it unnecessary to reject the latter claim; and (2.) that s. 233 was intended only to provide for designating the Court to hear disputed claims, and not that (where the claim was not settled by agreement) no award could be made without the determination of the Court.

The Court of Appeal agreed with the Chief Justice, (1.) that the claim for compensation to be dealt with and determined under the provisions of the Mining Act, 1898, was a claim made and served after the proclamation had been made by the Governor, constituting the watercourse as a watercourse into which tailings, &c., may be discharged, and that the claim referred to in s. 109 was merely a notice of an intended claim for compensation in the event of the proclamation being made. But they also held, differing from the view of the Chief Justice, (2.) that s. 233 of the Act of 1898 required that in the absence of an agreement between the claimant and the Minister of Mines, the compensation payable in respect of such claim must be assessed by the proper Court, whether the Minister gives or does not give notice in terms of s. 44 of the Act of 1894 that he does not admit the claim.

Asquith, K.C., and *Skerrett*, for the appellant, contended that s. 44 of the Public Works Act, 1894, was incorporated by the Mining Act, 1898. Sect. 115 of the latter Act provides that all claims for compensation in respect of the proclamation made in this case shall be assessed under Part VII., which in its turn provides that they shall be made under the provisions of the incorporated Part III. of the Act of 1894 and its 2nd and 3rd schedules. Two claims accordingly were necessary. That under s. 109 of the Mining Act is not enough. There must be a claim under the Act of 1894, and if that is not disputed it may be treated as undisputed, and the appellant is entitled to the benefit of s. 44. Reference was made to s. 233 of the Act of 1898, and it was contended that that section only designates the Court which is to hear disputed claims. It does not enact that all claims not settled by agreement should be heard and determined by the Court therein mentioned. To read it as having that effect would practically repeal s. 44 of the Act of 1894, and with it ss. 45 and 47. The provisions contained in those sections would become inapplicable and of no effect. Sect. 44 of the earlier Act must be read with s. 233 of the later Act, and the failure to give notice of dispute under the one section must be treated as equivalent to a settlement of the claim by agreement within the meaning of the other. Reference was made to *Wellington Corporation* v. *Johnston and Lloyd*. (1)

Haldane, K.C., H. D. Bell, and *Northcote*, for the respondent, contended that the incorporation relied upon by the appellant of the provisions of the earlier Act with regard to compensation in the later Act was not so absolute and unqualified as suggested. The words at the end of s. 232 of the Act of 1898 are that the incorporated provisions "shall be read and construed subject to the provisions" contained in the incorporating Act. Sect. 233 of the Mining Act provides only two modes of settling the amount of compensation—private agreement or determination by an appointed Court. Sect. 44 of the earlier Act is not repealed in any way; it is inapplicable to the case. It applies subject to the provisions of s. 233 and these exclude the particular case from its purview. It was also contended that the

(1) [1902] A. C. 396.

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rejection of the claim made by the appellant under s. 109 of the Mining Act was sufficient to prevent his claim being treated as undisputed. The second claim, though after the proclamation, was merely a repetition of the former claim, and was not to be treated as so distinct therefrom that the absence of a formal notice under s. 44 was rendered equivalent to an admission, regardless of the express provision of s. 233 that in the absence of an express agreement the decision of the Court must be obtained.

Skerrett, replied.

1904 *Aug.* 5.

The judgment of their Lordships was delivered by

LORD LINDLEY. The question raised by this appeal turns on the construction of some sections of the New Zealand Mining Act, 1898, which incorporates Part III. of the New Zealand Public Works Act, 1894, and the 2nd and 3rd schedules thereto. The appellant, Mr. Heslop, claimed compensation under the Mining Act for lands injuriously affected, and having, as he says, had no notice that his claim was not admitted, he treated it as undisputed, and obtained judgment for the sum claimed, namely, 392*l.*, under the provisions of the Public Works Act. The Government contend that notice was given him that his claim was not admitted, and that it ought to have been adjudicated upon as provided by the Mining Act, and that the judgment obtained ought to be set aside. Stout C.J. has decided in favour of Mr. Heslop, but the Court of Appeal have taken a different view. Hence the present appeal.

One difficulty in the case arises from the fact that the Public Works Act is adapted to a procedure somewhat different from that prescribed by the Mining Act. Only one claim is contemplated by the Public Works Act, whilst the Mining Act requires one, and by incorporating the Public Works Act suggests another; and the practice is to send in two. When two are sent in the question arises whether the first or the second is the one to which the Public Works Act applies. Both Courts in the Colony agree that two claims are necessary under the Mining Act, and although their Lordships are much impressed

with the argument addressed to them to the effect that under the Mining Act only one claim, namely, the first, is really necessary, they are not prepared to say that the view taken in the Colony on this point is erroneous. If one claim, namely, the first, is the only one which is to be regarded, then the course taken by Mr. Heslop was clearly wrong, for he had notice that his first claim was disputed. Their Lordships, however, will assume that two are not improper, and that if two are necessary the second is to be the one to be regarded.

The Mining Act, 1898 (ss. 108 and 109), in effect enacts that before any proclamation is made declaring that a river is one into which mining débris and waste water from mines may be turned, an application for such proclamation must be made to the Governor, and be publicly notified. The notice requires all persons who object to the proclamation being made to send in full particulars of such objection, "and also a claim in the prescribed form setting forth full particulars of all compensation that will be claimed by him in the event of such proclamation being made," and no one who omits to send in a claim as thus required will be entitled to compensation.

On August 13, 1900, a notice was published that application had been made for a proclamation that mining débris and waste water from mines might be discharged into the river known as the Inangahua river, and stating that objections were to be sent in within ninety days.

On November 6, 1900, Mr. Heslop sent in his claim and full particulars, and stated that in the event of such proclamation being made he should claim 392*l.* in respect of some building allotments which he specified. This will hereafter be referred to as his first claim,

On November 13, 1900, he was informed that his claim was declined.

On August 1, 1901, the proclamation was issued. On the 21st of the same month Mr. Heslop wrote to the Under-Secretary of the Mines Department declining an offer of 70*l.* which had been made to him, and asking that his claim might be reconsidered. On September 10 he received an answer that more would not be given him. He wrote another letter on

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the 19th, and on October 4 he was referred to the answer of September 10.

Nothing more was done until June 2, 1902, when Mr. Heslop sent in another claim (his second) for the same sum as before, namely, 392*l.*, in respect of land and buildings. The land here mentioned omitted some of the allotments specified in the first claim, and the mention of the buildings was new. This claim was made long after the expiration of the ninety days mentioned in the notice of August 13, 1900.

On July 7, 1902, the Under-Secretary sent to the solicitors of Mr. Heslop and a number of other claimants a letter acknowledging the receipt of the claims they had sent in, and which had been personally handed to the Minister on July 4.

No further notice was taken of these claims; but the solicitors of the Minister having been informed that it was intended to treat them as undisputed and to file them and enter up judgment upon them, wrote to Mr. Heslop's solicitors on October 13, 1902, remonstrating, and pointed out that they had all been declined shortly after their receipt. The claims were nevertheless filed as undisputed, and judgments were entered up for the full amounts claimed. The question is whether this was right.

The Mining Act deals specially with claims arising from the authorized pollution of rivers, and s. 112 provides for compensation for such cases, and the claim which is referred to in that section is evidently the claim referred to in s. 109, and required to be sent in before the proclamation is made. Sect. 113 puts a limit on the total amount payable in respect of such claim. Sect. 114 contains another special provision, and s. 115 says in effect that, subject to the foregoing provisions, all claims for compensation against the Crown arising from the proclamation shall be "assessed and disposed of" as provided by Part VII. Part VII. is headed "Compensation," and begins with s. 232. Sects. 232 and 233 are as follows:—

Sect. 232: "(1.) Subject to the provisions hereinbefore contained, all claims against Her Majesty for compensation in respect of any matter for which such compensation is expressly

provided by this Act, whether for the value of improvements, the taking of land, the injury to land, or to riparian rights or otherwise, shall be made in the manner provided in Part III. of 'The Public Works Act, 1894,' and the 2nd and 3rd schedules thereto, as modified by this Act, which said Part III. and the said schedules shall be deemed to be incorporated with this Act, but for the purposes of such incorporation shall be read and construed subject to the provisions of this Act. (2.) The word 'Minister' in the said Part III. shall for the purposes of this Act mean Minister of Mines, and not the Minister for Public Works."

Sect. 233: "(1.) If any such claim for compensation is not settled by agreement between the claimant and the Minister, the same shall be heard and determined by a judge of the Supreme Court if it exceeds 250*l.*, and by the magistrate exercising jurisdiction in the locality where the claim arose if it does not exceed 250*l.*: Provided that, on application in this behalf by either of the parties, the functions by this sub-section conferred upon the judge of the Supreme Court, may by him be delegated to a judge of the District Court. (2.) Subject to the provisions of the said Part III. relating to assessors, the judge or magistrate, as the case may be, shall be deemed to be a Compensation Court thereunder. (3.) In every such claim the Minister shall be the respondent."

Sect. 234 enacts (inter alia) as follows: "Every claim for compensation shall be made in writing, addressed to the Minister, and except when by this Act otherwise provided, shall be served on him within the period of twelve months from the date when the same arose, or within such extended period as a judge of the Supreme Court by order may allow"; and s. 235, that "No claim for compensation shall be allowed unless it is made and served in the manner and within the period or extended period prescribed by this Act."

Their Lordships are of opinion that, having regard to the clear and distinct enactment contained in s. 233, every claim for compensation in respect of a proclamation made under s. 109 must, if not settled by agreement, be determined by a judge or magistrate as directed by s. 233, and cannot be treated

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as undisputed under s. 44 of the Public Works Act, even if no notice disputing it is served. The incorporation by s. 232 of the machinery of the Public Works Act is controlled by being expressly made subject to all the provisions of the Mining Act. The words at the end of the section shew this, although the words at the beginning are limited to the preceding sections.

The claims for compensation referred to in ss. 232 and 233, when made in respect of proclamations authorizing the pollution of rivers, are the claims specially required to be made by the Mining Act, and not those claims which are only required to be made by the Public Works Act; and even if both are necessary, the summary procedure authorized by s. 44 of that Act is quite inconsistent with s. 233 of the Mining Act. Their Lordships cannot think that this section merely alters the Court which under ss. 49–54 of the Public Works Act is to decide disputed claims. The language of s. 233 is too wide and explicit to be so limited.

Their Lordships will, therefore, humbly advise His Majesty to dismiss this appeal, and the appellant must pay the costs.

Solicitors for appellant: *Blyth, Dutton, Hartley & Blyth.*

Solicitors for respondent: *Mackrell, Maton, Godlee & Quincey.*

[PRIVY COUNCIL.]

HANSON AND ANOTHER . . . . . PLAINTIFFS; J. C.* 1904 July 19; Aug. 5.

AND

CORPORATION OF THE VILLAGE OF GRAND MÈRE . . . . . } DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Guarantee of Debentures by a Municipality—Invalidity of By-law—Quebec Act (60 *Vict. c.* 78), *ss.* 7 (*c*) *and* 27—*Construction—Approval by Ratepayers and Lieutenant-Governor.*

A by-law enacted under the Towns Corporation Act (c. 1, tit. 11, Revised Statutes of Quebec, 1888) by the respondent corporation guaranteed debentures to a specified amount to be issued by a company with which the corporation contracted for the execution of a public work within the municipality; but the same had not been submitted to the municipal electors for their approval or to the Lieutenant-Governor for his authority:—

Held, in a suit by debenture-holders against the corporation, that the guarantee was in consequence ultra vires:

Held, also, with regard to the special Act (60 Vict. c. 78) under which the company was incorporated, that the above contract involved a financial obligation on the part of the corporation within the meaning of s. 7 (*c*). Both under that section and s. 27, which should be read together, a by-law must be approved by a majority of the whole body of ratepayers.

APPEAL from a decree of the Supreme Court (Oct. 7, 1902) affirming a decree of the Court of King's Bench appeal side (Feb. 25, 1902), which affirmed a decree of the Superior Court of Montreal dismissing with costs an action which had been brought by the appellants as transferees and as holders against the respondents as guarantors of a debenture of $3125, the first of a series of twenty-five debentures, issued by the Stadacona Water, Light, and Power Company.

The sole question was whether the approval of the by-law under which the debentures were issued by a vote of the ratepayers and by the Lieutenant-Governor was necessary in order

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

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to the legality of the guarantee by the respondents of the payment of the debenture.

The respondents were incorporated by a statutory charter, 61 Vict. (1898) c. 61 (Quebec), the 4th section whereof applies to them the general law governing town corporations except in so far as the special Act derogates therefrom or contains provisions inconsistent therewith.

The provisions of the general law are those contained in the Revised Statutes of Quebec, arts. 4178 et seq., under which it was admitted, if they were applicable to the transaction in question, the vote of the ratepayers and the approval of the Lieutenant-Governor would be essential.

Special legislative provisions, however, had been made in this regard, and the controversy turned upon the effect and construction of those provisions, sufficiently set out in their Lordships' judgment, which are contained in 60 Vict. (1897) c. 78 (Quebec).

Blake, K.C., and *Falconer*, for the appellants, contended that these decrees were wrong, and that it was not necessary for the validity of the by-law in this case that it should be approved by a vote of the ratepayers or by the Lieutenant-Governor in Council. By s. 7 (*c*) of the Quebec Act (60 Vict. c. 78) that approval is required in certain classes of contracts, but it does not apply to this case. It is followed by s. 27, which contains special provisions applicable to this case, and under which that approval is not required; the approval by a majority of the ratepayers of or part of the municipality being therein the only prescribed condition. The effect of s. 27 being applicable is to except the case from s. 7 (*c*). The whole statute should receive a large and liberal construction, so as to effectuate the object for which it was passed: see art. 12 of the Civil Code. The intention was to facilitate waterworks, drainage, and other municipal improvements: see especially s. 27. The construction put upon these sections by the lower Courts is a hindrance thereto. Accordingly, if there be any ambiguity the general and earlier s. 7 (*c*) should yield to the special and subsequent s. 27.

Haldane, K.C., and *Beaudin, K.C.*, for the respondents, were not heard.

Aug 5. The judgment of their Lordships was delivered by

LORD DAVEY. The appellants are holders of a debenture for $3125 issued by the Stadacona Water, Light, and Power Company, and purporting to be guaranteed by the respondents, the corporation of the village of Grand Mère, under the provisions of a municipal by-law, No. 10, passed on June 15, 1899. The appellants sue the respondents on their guarantee. The respondents plead (amongst other defences) that the by-law in question as well as a contract of June 20, 1899, to give the guarantee were ultra vires and did not bind the respondents, on the ground that the by-law had not been approved by the majority in number and value of the municipal electors, or authorized by the Lieutenant-Governor of the province. It is admitted that the by-law was not even submitted to the electors for their approval or to the Lieutenant-Governor. The only question on this appeal is whether the approval of the electors and the Lieutenant-Governor or of either of them was necessary to the validity of the by-law.

By the provision of the Towns Corporation Act, being c. 1, tit. 11, of the Revised Statutes of Quebec, 1888 (which applies to the respondents), a municipal corporation is empowered to aid in the construction of public works within the municipality by any incorporated company by guaranteeing, by indorsation or otherwise, any sum of money borrowed by such company, but every by-law for that purpose before coming into force requires to be approved by the electors of the municipality who are proprietors and authorized by the Lieutenant-Governor, and every such by-law is required to be submitted for the approval of the electors within thirty days after the council has passed the same.

The Stadacona Water, Light, and Power Company was incorporated by 60 Vict. c. 78, of the Statutes of 1897 (Quebec), two clauses of which are material, namely, paragraph (*c*) of s. 7 and s. 27. These clauses are in the following terms :—

"Sect. 7 (*c*). Any contract or arrangement between a

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municipal corporation and the company for the construction and working of waterworks systems or other works authorized by this Act, shall, if such contract or arrangement involves financial obligations on the part of such corporation, be valid only when the by-law authorizing such contract or agreement has been approved by the ratepayers and by the Lieutenant-Governor in Council, according to the laws concerning the issue of municipal bonds."

"Sect. 27. In the event of the company undertaking the construction of a system of waterworks, drainage, or lighting in any municipality, the company may make arrangements with the corporations from which it shall have obtained concessions or franchises for a certain number of years for the construction and working of such system, in virtue whereof the revenues of said systems shall be collected or levied by the said municipal council. And notwithstanding any provision to the contrary in the charter of such municipality and provided it be thereto authorized by petition of the majority in number and in value of the ratepayers of that portion of the municipality to which the system shall extend, the council may, in such cases, bind itself by by-law to collect or levy the said revenues, and may, moreover, guarantee the bonds or debentures issued by the company in connection with the said systems, to the extent of two-thirds of the revenues, the collection whereof shall have been confided to it by the company; but such guarantee shall not be for a longer period than that of the concession or franchise granted to the company by the said corporation in connection with the said systems. And in the event of the said revenues not being binding, the council of the municipality may cause to be prepared by its secretary-treasurer an estimate of the probable revenues of the said system, and such estimate, after having been approved by the council, shall serve as a basis for establishing the amount of the said guarantees. The revenue so collected by the corporation shall be devoted to the payment of the interest on and the capital of the bonds or debentures which it shall have so guaranteed, either in whole or in part, as the municipal council of such corporation shall decide."

By by-law No. 10, dated June 15, 1899, after reciting that the council had been authorized by petition of the majority in number and value of the ratepayers of the village of Grand Mère to make with the company the arrangements thereafter stipulated respecting the collection of revenues and the municipal guarantee on the obligations or debentures of the company (art. 2), the offer of the company to undertake the construction and working of water and sewage works on the conditions thereafter stipulated was accepted and the company was authorized to proceed to the execution of its obligations; (art. 3) the council granted to the company exclusive rights to use the streets and public places of the municipality for the purposes of their undertaking for a period of twenty-five years from the completion of the works; (art. 23) the council agreed to receive in trust for the company the water and sewage rates for a commission of 5 per cent. on the amount collected; art. 24) the council agreed to guarantee the debentures to be issued by the company for an amount not exceeding two-thirds of the probable revenues during the term of the concession, and the probable revenues were estimated at a certain sum to serve as a basis for fixing the amount of the guarantee once for all; (art. 25) the net profits were to be divided equally between the corporation and the company; and (art. 27) in case the revenues were insufficient to meet the full amount of the guarantee the company was to make good the deficiency before the due date of the payments.

By the contract of June 20, 1899, the company undertook to construct the works on the conditions agreed upon, and the council agreed to receive the revenues in trust, and to guarantee the debentures on the same terms as are mentioned in the by-law.

The learned judge in the Superior Court, on the authority of a case of *Hanson* v. *Corporation of the Village of Gatineau* (1), held that the guarantee purporting to be given by the respondents in the present instance was ultra vires on the ground that the bonds were issued without authority of the Lieutenant-Governor to the by-law. And the Court of King's Bench confirmed this decision.

(1) (1901) 10 Quebec L. R. (K.B.) 346.

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Blanchet J. alone dissented from the judgment of the King's Bench, as he had done in the *Gatineau Case* (1), and referred to his judgment in that case for the reasons of his opinion. It appears from a perusal of that judgment, which is printed in the record, that in the opinion of the learned judge, s. 7 (*c*) applied only to cases in which the corporation contracts direct financial obligations by causing waterworks to be constructed for the corporation itself, and at its own cost, and is therefore the principal debtor, and that the section has no application to a case where the corporation guarantees the obligations of a contractor or concessionaire who is the principal debtor as in s. 27. Lacoste C.J. was of opinion that the provisions of s. 27 must be read together with and subject to those of s. 7 (*c*), and that the petition of the majority of that portion of the municipality to which the system extends (required by s. 27) is not a substitute for the approval of a majority of the whole of the electors upon whom the burden is imposed.

In the Supreme Court Girouard J. dissented from the opinion of the other learned judges of the Court on the same grounds as those stated by Blanchet J., and he also expressed the opinion that the debentures were negotiable instruments. The majority of the Court concurred in giving judgment for the present respondents, but gave no written reasons.

Their Lordships are of opinion that the contract of June 20, 1899, is a contract involving financial obligations on the part of the corporation within the meaning of s. 7 (*c*) of the Water Company's Act. They are not prepared to say with Hall J. that the powers of s. 27 do not extend to giving a personal guarantee by the corporation. But they think with Lacoste C.J. that the two sections must be read together. Sect. 27 authorizes a very special form of contract, in which the giving of a guarantee is an incident, but there is nothing to take such a contract out of the express and unqualified provisions of s. 7. They also agree that the requirement as a condition precedent of a petition by a majority of the ratepayers of a part only of the municipality is not a substitute for the approval of the by-law when passed by a majority of the whole body of

(1) 10 Quebec L. R. (K.B.) 346.

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ratepayers, and it makes no difference in the construction of the Act that in the present case the two bodies were identical. The two conditions seem to be diverso intuitu.

Their Lordships will, therefore, humbly advise His Majesty that the judgment appealed from ought to be affirmed, and the appeal dismissed. The appellants will pay the costs of the appeal.

Solicitors for appellants: *Simpson, Rushforth & Co.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

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PACIFIC CO-OPERATIVE STEAM COAL COMPANY, LIMITED . . . . . } PLAINTIFFS;

AND

RAILWAY COMMISSIONERS OF NEW SOUTH WALES . . . . . } DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Public Works Act, 1900, *s.* 116, *sub-s.* 2 (*b*)—*Costs of Action, Arbitration, and Award.*

Where the respondents tendered 2000*l.* as compensation due under the New South Wales Public Works Act, 1900, and the appellants were awarded 18,450*l.* by the arbitrators, and recovered 17,609*l.* in an action brought:—

Held, that by the unambiguous language of s. 116, sub-s. 2 (*b*), the appellants must bear all the costs of the action, arbitration, and award, notwithstanding the inadequate tender made by the respondents.

APPEAL from an order of the Supreme Court (Aug. 28, 1903) setting aside a judgment signed by the appellants in an action brought by them to recover compensation for mines under land resumed by the respondents for the purpose of certain railway improvements at Teralba, in the State of New South Wales.

The sole question was whether, under the circumstances

* *Present:* LORD DAVEY, LORD ROBERTSON, SIR ARTHUR WILSON, and SIR HENRI TASCHEREAU.

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stated in the judgment of their Lordships, the appellants are, by the operation of s. 116, sub-s. 2 (*b*), of the Public Works Act, 1890, disentitled to the costs of the action which, by virtue of s. 116, sub-s. 3, of the said Act, include the costs of a previous arbitration and award in their favour.

Cohen, K.C., and *Tyrrell Paine*, for the appellants, contended that upon the proper construction of s. 116 of the Act of 1900 they were not disentitled to their costs. The respondents only offered 2000*l.*, refused to pay 18,450*l.* after award, and rendered the action necessary if any relief were to be obtained. It is manifestly unjust and inequitable that the appellants should have to pay the whole costs of arbitration and action which the respondents forced upon them. The amount of compensation fixed by the jury was largely in excess of the respondents' offer: see s. 116, sub-s. 2 (*b*). The appellants were satisfied with the award, and the respondents should pay the costs of the action which they rendered necessary, if it were possible so to construe the Act, for in case of ambiguity a reasonable construction should be adopted. Moreover, a statute may be construed contrary to its literal meaning when a literal construction would result in an absurdity, and the words used are susceptible of another construction which will carry out the manifest intention: see *Grey* v. *Pearson* (1); *Ex parte Walton* (2); *Hill* v. *East and West India Dock Co.* (3); *Perry* v. *Skinner*. (4)

H. Terrell, K.C., and *Vaughan Hawkins*, for the respondents, contended that by the plain and unambiguous meaning of s. 116 "the sum awarded" throughout sub-s. 2 means the sum awarded by the arbitrators, i.e., the 18,450*l.* The verdict was for a less sum than that so awarded, and accordingly by the equally plain meaning of s. 116, sub-s. 2 (*b*), the costs must be borne by the claimant of the action, arbitration, and award. They referred to *Ex parte Copeland*. (5)

Cohen, K.C., replied.

(1) (1857) 6 H. L. C. 61.
(2) (1881) 17 Ch. D. 746.
(3) (1884) 9 App. Cas. 448, 456.
(4) (1837) 2 M. & W. 471, 475; 46 R. R. 656.
(5) (1852) 2 D. M. & G. 914, 920.

July 29. The judgment of their Lordships was delivered by

LORD ROBERTSON. The question raised by the present appeal is whether the appellants are not liable in the costs of (1.) a certain arbitration, and (2.) a certain action. The liability asserted against the appellants is said to be created by the express terms of s. 116 of the Public Works Act, 1900, of New South Wales.

The appellants were lessees of coal mines in New South Wales; and the respondents' railway came to be constructed in such proximity to those mines that the respondents gave the appellants notice not to work. It is unnecessary to set out the procedure leading up to this notice, all that is relevant being the result, namely, that the respondents became bound to pay compensation for preventing the appellants from working the minerals; and they tendered the appellants 2000*l.* The appellants having refused to accept this sum, the compensation to be given went, under the statute, for settlement by arbitrators. Before the arbitrators the appellants claimed 25,000*l.*, and were awarded 18,450*l.* The respondents, being dissatisfied with this award, and desiring to have the compensation settled by a jury, gave notice to that effect to the appellants. By this notice the appellants were, under the statute, disabled from enforcing the award of the arbitrators, and had no means of recovering compensation except by an action in the Supreme Court. This action accordingly was brought; the case was tried by Pring J. and a special jury, with the result that a verdict was found assessing the compensation at 17,609*l.*, being less by 841*l.* than the award of the arbitrators. The appellants signed judgment for 17,609*l.* and costs; but the Supreme Court, on August 28, 1903, set aside the judgment. The sum of 17,609*l.* having been paid, the only question is as to costs, including both costs of action and costs of the arbitration.

Now the statute, by s. 116, sub-s. 2, deals with the question of costs in several events, and the respondents maintain that head (*b*) of that sub-section is in terms applicable to this case.

For greater clearness the whole of s. 116 is here set out:—

"Sect. 116. (1.) If the compensation awarded by the arbitrators exceeds the sum of three hundred pounds, and either

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party is dissatisfied with the award and desires to have the compensation settled by a jury, and, within fourteen days after the making of the award and notice thereof, signifies such desire by notice in writing to the other party, then no steps shall be taken to enforce performance of the award, but the party claiming compensation shall proceed by action in the Supreme Court, in the usual manner, to recover from the constructing authority the compensation to which he may be entitled under the provisions of this Act.

"(2.) Upon the trial of the said action, if the verdict is—

"(*a*) For a greater sum than the sum previously offered by the constructing authority and awarded by the arbitrators, all the costs of the said action and of the arbitration and award shall be borne by the said constructing authority;

"(*b*) For a less sum than the sum so awarded, all the costs of the said action and of the arbitration and award shall be borne by the claimant;

"(*c*) For the sum awarded by the arbitrators, all the costs of the said action and of the arbitration and award shall be paid by the party requiring the same to be referred to a jury.

"(3.) In every such case the costs of the arbitration and award shall be added to, and be recoverable as, the costs of the action."

It seems to their Lordships perfectly clear that by "sum so awarded" in sub-s. (*b*) is meant simply sum "awarded by the arbitrators," those being the words in the immediately preceding context to which the word "so" relates. Their Lordships find it impossible to introduce, through the word "so," the words "previously offered by the constructing authority and" which occur in head (*a*). The sum so awarded being the sum awarded by the arbitrators according to the plain meaning of the words, there is an end of the appellants' case.

That the result is singular cannot be denied. If the verdict is to be taken as the true test of the compensation due, the tender of the respondents was inadequate, and it is equally clear that (apart from negotiation) the appellants had no means of getting more except by going to the arbitrators, and, when the respondents refused to pay the sum awarded, then raising action and going to a jury. That the appellants

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should bear the whole costs of both proceedings has been represented with much plausibility as surprising. This consideration, however, cannot be allowed to operate further than to induce caution in accepting the interpretation which involves this result. Having given due weight to these considerations, their Lordships find the language of the statute to be unambiguous.

They will, therefore, humbly advise His Majesty that the appeal ought to be dismissed; and the appellants will pay the costs of the appeal.

Solicitors for appellants: *Paines, Blyth & Huxtable.*
Solicitor for respondents: *G. M. Light.*

[PRIVY COUNCIL.]

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July 19, 20; *Aug.* 5.

ATTORNEY-GENERAL FOR MANITOBA . . . . . } PLAINTIFF;

AND

ATTORNEY-GENERAL FOR CANADA . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canadian Act (48 & 49 *Vict. c.* 50), *s.* 1 — *Construction — Transfer of Proprietary Right—Vesting at a Future Date.*

By s. 1 of the Canadian Act (48 & 49 Vict. c. 50), subsequently re-enacted by Revised Statutes of Canada, c. 47, s. 4, it was provided that all Crown lands which may be shewn to the satisfaction of the Dominion Government to be swamp lands shall be transferred to the province and enure wholly to its benefit and uses:—

Held, that by its true construction the section did not operate an immediate transfer to the province of any swamp lands or of the profits arising therefrom, but only from the date of the Order in Council, made after survey and selection as prescribed by the Act directing that the selected lands be vested in the province. Down to that date the profits resulting from the transferred lands belonged to the Dominion.

APPEAL by special leave from a decree of the Supreme Court (Feb. 16, 1904) affirming a decree of the Exchequer Court of Canada (June 29, 1903).

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

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The action was brought on September 15, 1902, under the circumstances stated in the judgment of their Lordships, to have it declared that the province of Manitoba was and is entitled to the revenues, rents, and profits received from the swamp lands in suit as and from July 20, 1885, the date on which the principal Act received the Royal assent. The Dominion contended that the province had no right thereto until such lands had been shewn to be swamp to the satisfaction of the Dominion Government.

The Supreme Court (Girouard and Killan JJ. dissenting) was of opinion that there were in the statute no words of present transfer, but that on the contrary the language used referred to future events dependent on the satisfaction of the Dominion Government, the occurrence of which events was a condition precedent to the determination as to the lands and the right to a transfer and the use and benefit of the lands, which right would then only arise. They thought that the words used were plain, and could not receive the forced construction contended for by the appellant.

Girouard J. held that a grant in præsenti and not in futuro was intended by the statute, and that the fee simple in the lands granted vested in the province from the date of the Act. The object was to ensure a present satisfaction of disputed claims. Killan J. also held that the Act should be treated as operating from the time of its enactment, and as providing that the uses and benefits were to accrue to the province from that time. The words "shewn to the satisfaction, &c.," were descriptive only of the lands to be transferred, and were not words of condition except in so far as the ascertainment of the lands imposed a condition upon the completion.

Haldane, K.C., Colin Campbell, A.-G. for Manitoba, and *R. O. B. Lane,* for the appellant, contended that ss. 1 and 4 of the Acts mentioned in their Lordships' judgment constituted a legislative grant in præsenti of all swamp lands in Manitoba to the sole benefit and uses of the province from the date of the passing of the said Acts. The subsequent identification and selection of the swamp lands by the Dominion

surveyors in no way operated as a condition precedent to the grant's taking effect, but merely gave precision to a title which had already vested by force of the statutes. The sole condition precedent to the grant is that which is specified in the Act of 1885 (see s. 7) requiring Manitoba's formal acceptance of the lands, which was duly given by the provincial legislature in 1886. Reliance was also placed on the words at the end of the two sections, "enure wholly to its benefits and uses," the only object of which was to emphasize that the grant involved a present and immediate vesting of title, with an immediate right to its benefits and uses. Reference was made to 33 Vict. c. 3, ss. 3, 25, 26; *Rutherford* v. *Greene's Heirs* (1); *Wright* v. *Roseberry* (2); *Missouri, &c., Ry. Co.* v. *Kansas Pacific Ry. Co.* (3)

Blake, K.C., Newcombe, K.C., and *Frank Russell*, for the respondent, contended that the subject of transfer was not proprietary right, but the right of administration and enjoyment of such lands as might in the future be shewn to the satisfaction of the Dominion Government to be swamp lands. Of necessity, therefore, it operated in futuro, and after that satisfaction had been obtained and expressed. The words both of ss. 1 and 7 plainly indicate a future and not a present transfer. Until the happening of the contingency of satisfaction the lands remained the property of the Dominion, and no trust was declared as to its benefits and uses, which followed the title and also belonged to the Dominion until the transfer was completed.

Campbell replied.

The judgment of their Lordships was delivered by

LORD ROBERTSON. The question raised by this appeal is whether certain swamp lands were vested in the province of Manitoba on the passing of a Canadian statute in 1885, or whether they only came to be vested in that province on certain later dates when the swamp lands were in fact transferred. There are no disputed facts; the proceedings consequent on the

(1) (1817) 15 U. S. 196. (2) (1887) 121 U. S. 488.
(3) (1878) 97 U. S. 491, 496.

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statute are simple; and the controversy is on the construction of the statute.

The Canadian Act (48 & 49 Vict. c. 50) is intituled "An Act for the Final Settlement of the Claims made by the Province of Manitoba on the Dominion."

Sect. 1 provides that "All Crown lands in Manitoba which may be shewn to the satisfaction of the Dominion Government to be swamp lands shall be transferred to the province, and enure wholly to its benefit and uses."

Sect. 2 provides for an allotment of land which shall be selected by the Dominion Government, and granted as an endowment to the University of Manitoba.

Sect. 3 provides that "The sum now payable annually to the province under the Act 45 Vict. c. 5 as an indemnity for the want of public lands shall be increased from $45,000 to $100,000, such increase to date from the 1st day of July, 1885."

Sect. 7 provides that "The grants of land and payments authorized by the foregoing sections shall be made on the conditions that they be accepted by the province (such acceptance being testified by an Act of the legislature of Manitoba) as a full settlement of all claims made by the said province for the reimbursement of costs incurred in the government of the disputed territory, or the reference of the boundary question to the Judicial Committee of the Privy Council, and all other questions and claims discussed between the Dominion and the provincial governments up to the 10th day of January, 1885."

In 1886, on the revision of the statutes, the above-recited s. 1 of the Dominion Act of 1885 was re-enacted in a slightly altered form as s. 4 of the Revised Statutes of Canada, c. 47. Sects. 3 and 4 of c. 47 of such Revised Statutes are as follows:—

"(3.) All ungranted or waste lands in the province shall be vested in Her Majesty, and administered by the Governor in Council for the purposes of Canada subject to and except in so far as the same are affected by the conditions and stipulations contained in the agreement for the surrender of Rupert's Land by the Hudson Bay Company to Her Majesty.

"(4.) All Crown lands in Manitoba which are shewn to the satisfaction of the Dominion Government to be swamp lands

shall be transferred to the province, and enure wholly to its benefit and uses."

The acceptance by Manitoba required by the 7th section was expressed in 1886 by the Act 49 Vict. c. 38 (Manitoba) in the following terms: "The legislature of the province of Manitoba accepts the grants and payments as authorized and construed by the above-recited Acts as a full settlement of all claims by the said province upon the Dominion as therein set forth up to the 10th day of January, 1885."

The procedure taken for carrying out the Dominion statute of 1885 was that, by a Canadian Order in Council, surveyors were appointed to select the lands to be granted, to report from time to time to the Minister of the Interior, and to submit lists of the lands so to be granted for the approval of the Governor in Council upon reports by the Minister.

The ultimate result of the procedure thus directed was that a revised and corrected list of lands was approved; and, by Order in Council dated April 16, 1888, his Excellency ordered that the lands mentioned in the annexed list, "amounting in all to an area of 52,600 acres be and the same are hereby vested in Her Majesty for the purposes of the province of Manitoba." The list occupies three pages of the printed record, and contains several hundred items.

Their Lordships observe that the very general terms of the statute making the grant rendered necessary a detailed survey, such as was actually made, to pick out of a very extensive territory those lands which might fairly be held to come within the description of swamp lands. The present claim of the appellant, when put in operative form, is that the province is entitled from the date of the statute to the profits of each parcel of land which has eventually, and after a process of selection, been transferred.

The question is whether this is the meaning of the section, and their Lordships do not think that it is. The subject-matter of the enactment is not a vindication of property, and is not a change of property, but of administration. The enactment itself is expressed as relating to the future. There is first, according to the scheme of the section, to be a showing to

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the satisfaction of the Government; and, after this has taken place, the lands "shall be" transferred. On their being transferred they "shall . . . . enure wholly to its benefit and uses," i.e., the benefit and uses of Manitoba. They do not enure to the benefit and uses of Manitoba until they are transferred.

Their Lordships cannot find in the words of the section any suggestion that Manitoba is to enjoy any benefit from the lands which arises before the transference, and the conception of the section is quite against it. The fruits or produce now in dispute having come into being before the transference would be a benefit plus what is described in the section. Those fruits arose while the administration of the lands was with Canada, and have been duly applied to Canadian uses.

The question comes before their Lordships on appeal against a judgment of the Supreme Court of Canada, given on February 16, 1904, affirming the judgment of the Exchequer Court of Canada, and dismissing the appeal therefrom of the plaintiff, the present appellant. Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. There will be no order as to costs.

Solicitors for appellant: *Harrison & Powell.*
Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

LEE . . . . . PROSECUTOR; J. C.*

AND 1904

ATHERTON . . . . . RESPONDENT. *Aug.* 4.

ON APPEAL FROM THE CONSISTORY COURT OF ELY.

Petition for Leave to appeal—Enlargement of Time—Clergy Discipline Act, 1892.

In order to obtain an enlargement of time to appeal, as limited by the rules made under the Clergy Discipline Act, 1892, a perfect explanation must be given of the delay incurred.

THIS was a petition for enlargement of time for giving notice of appeal, and for leave to appeal from an order of deprivation founded on a judgment (Jan. 16, 1904) of the Consistory Court. The order of the bishop was made on February 9.

The petition alleged poverty as an excuse for delay, and that on June 18 the petitioner first came into receipt of sufficient funds (the gift of relatives) to enable him to prosecute an appeal. The following rules made under the Act were referred to at the hearing: Rule 60, to the effect that notice of appeal in any matter of law must be given not more than twenty-eight clear days after judgment given; rule 61, that a petition for leave to appeal on the facts must be lodged in not more than fifteen days; rule 90, which provides for enlargement of time by the Appellate Court although the application for the same is not made until after the expiration of the time limited.

Shearman, K.C., and *Stimson*, for the petitioner.

A. B. Kemp, for the respondent.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. Their Lordships are of opinion that the amount of time that has elapsed since judgment was

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON. *Ecclesiastical Assessors:* THE ARCHBISHOP OF CANTERBURY, THE BISHOP OF LLANDAFF, and THE BISHOP OF RIPON.

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given—January 16, 1904—is not sufficiently accounted for. The long delay between then and the time—July 19, 1904—when this petition was lodged requires perfect explanation in order to justify their Lordships in enlarging the time limited by the rules made under the Clergy Discipline Act, 1892, for prosecuting appeals. That explanation has not been given; and the consequence is that their Lordships will humbly advise His Majesty to dismiss this petition.

Solicitors for petitioner: *Purkis & Co.*
Solicitors for respondent: *Lee, Bolton & Lee.*

[PRIVY COUNCIL.]

Considered. FUNG KAI SUN *v.* CHAN FUI HING [1951] A. C. 489

J. C.* 1904 *July* 26.

WILLIAM EWING & CO. . . . . DEFENDANTS;

AND

THE DOMINION BANK . . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Practice—Petition for Special Leave by Appellants to Supreme Court.

Petition for special leave to appeal from the Supreme Court of Canada dismissed where the petitioners were appellants to that Court and no important question of law was raised.

THIS was a petition by the defendants for special leave to appeal from a decree of the Supreme Court (June 8, 1904), which dismissed the petitioners' appeal from a decree of the Court of Appeal for Ontario under the circumstances stated in the judgment of their Lordships.

Robinson, K.C., for the petitioners.
Aylesworth, K.C., for the respondents.

The judgment of their Lordships was delivered by

LORD DAVEY. This is a petition for special leave to appeal from the Supreme Court of Canada. The case was tried in

* *Present:* LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

the first instance by Meredith J. (without a jury), when the learned judge held that the note in question was forged, and that the petitioners were estopped from denying the signature by their not having informed the bank in due time. There was an appeal from that decision to the Court of Appeal for Ontario, and that Court dismissed the petitioners' appeal. The petitioners then appealed to the Supreme Court of Canada, and that Court, consisting of five judges, by a majority of three to two, dismissed the petitioners' further appeal. Their Lordships would not be disposed, in these circumstances, to advise His Majesty to exercise his prerogative in favour of the petitioners, unless they were satisfied that there were strong grounds for believing that a very important question of law was involved, and the petitioners had made out a primâ facie case which would warrant their Lordships in advising His Majesty to give special leave to appeal. Their Lordships are of opinion that the petitioners have failed to make out any such case.

The case is a peculiar one. A man named Wallace forged the name of the petitioners' firm to a promissory note, dated August 14, 1900, and handed that promissory note on August 15 to the Dominion Bank, who were the plaintiffs, and are the respondents on the present petition. The Dominion Bank, following a very wise and proper practice which has grown up, gave notice, dated August 15, to Messrs. Ewing (who got the notice the next day) that they had received the note, which would fall due on December 17, 1900. In the meantime they had paid out part of the proceeds to Wallace, the forger of the note, at various times, and on August 17, 1900, it is said that all but a trivial amount had been drawn out. Messrs. Ewing, wishing apparently to screen Wallace, did not give the bank any information that the note was forged, and they must have known that their withholding such information from the bank would entitle the bank to believe that the note was a genuine note of Messrs. Ewing themselves. Whether the circumstances were such as would raise either an estoppel against the petitioners, or would amount to what Lord Blackburn in

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M'Kenzie v. *British Linen Co.* (1) calls a "ratification for a time" by the supposed makers of the note of their signature, is, in the opinion of their Lordships, absolutely a question of fact. They cannot see that any important question of law is really at stake. At any rate, their Lordships cannot see that there was not evidence upon which the Courts might fairly find as they did; and that being so, their Lordships are not prepared to advise His Majesty to exercise his prerogative by giving special leave to appeal to the petitioners.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the petition. The petitioners will pay the costs of it.

Solicitors for petitioners: *Harrison & Powell.*
Solicitors for respondents: *Blake & Redden.*

(1) (1881) 6 App. Cas. 82, at p. 101.

Applied. BENNETT & WHITE (CALGARY) LD. *v.* SUGAR CITY [1951] A. C. 786

[PRIVY COUNCIL.]

TORONTO RAILWAY COMPANY . . PLAINTIFFS;

AND

CORPORATION OF THE CITY OF TORONTO . . . . . } DEFENDANTS.

J. C.*
1904
July 14:
Aug. 5.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Revised Statutes of Ontario, c. 224, *s.* 39, *sub-s.* 2—*Personal Estate exempt from Assessment—Electric Cars not Real Estate—Res Judicata—Jurisdiction in Appeal from Assessment Officer.*

Under c. 224 of the Revised Statutes of Ontario, 1897, the personal property of the appellant railway company is exempt from assessment (s. 39, sub-s. 2), while its real estate (s. 2, sub-s. 9) includes everything affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty:—

Held, that its electric cars are personal estate, inasmuch as they are not part of the railway and are not fixed in any sense to anything which is real estate:

Held, also, that a decision between the same parties by the Court of Revision, established under s. 62 of the above Act, and of the Courts in appeal therefrom, to the effect that the electric cars were assessable, is not res judicata. By s. 68 the jurisdiction of those Courts is confined to the amount of assessment, and does not extend to validate an assessment unauthorized by the statute.

APPEAL from a decree of the Court of Appeal (May 15, 1903) affirming a decree of Ferguson J. (March 2, 1903) dismissing the appellants' action with costs.

The action was for a declaration that the appellants' cars (described in the judgment of their Lordships) were personal property, and as such were not liable for $8775 sought to be levied as taxes thereon by the respondents.

The principal question decided was whether these cars were personal estate, exempt from assessment under s. 39, sub-s. 2, of the Revised Statutes of Ontario, c. 224.

The Courts below held that they were real estate, in

* *Present:* LORD DAVEY, LORD ROBERTSON, SIR ARTHUR WILSON, and SIR HENRI TASCHEREAU.

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accordance with their own judgment in an appeal which had been brought from the assessment made in the first instance by the assessment commissioner for the city. In so deciding the Courts had followed a previous decision in *Bank of Montreal* v. *Kirkpatrick* (1), to the effect that under a mortgage to secure debentures given upon the real estate of an electrical street railway company, together with all buildings, machinery, appliances, works, and fixtures, and also all rolling stock, poles, wires, and other equipment, the debenture-holders were entitled to the rolling stock, poles, and wires as against an execution creditor having an execution against its goods and chattels.

Haldane, K.C., and *Bicknell, K.C.*, for the appellants, contended that the cars were personal estate. Whatever may have been the proper decision of a case involving the rights of debenture-holders, the decision (1) as given does not establish that the cars were real estate for the purposes of assessment, or if it does it was wrong. These cars were separate and distinct entities from the land. The assessment authorized was on the land, and not on the undertaking of the company. The cars were in no sense affixed to the land. Their very essence was movability, and they were moved out of the city every day. The appellants have adopted the right remedy in this case, a suit to try the validity of the assessment. Reference was made to *Great Western Ry. Co.* v. *Rouse* (2); *Toronto Street Railway* v. *Fleming* (3); *Nickle* v. *Douglas* (4); *Weaver* v. *Price* (5); *Governors of Bristol Poor* v. *Wait* (6); *Bonnell* v. *Beighton* (7); *Groenvelt* v. *Burwell* (8); *Milward* v. *Caffin* (9); *City of London* v. *Watt & Sons* (10); *Wake* v. *Hall.* (11)

With regard to the point being res judicata in appeal between the same parties for the original order of assessment, the jurisdiction invoked in that appeal was one limited to ascertaining

(1) (1901) 2 Ont. L. R. 113.
(2) (1858) 15 U. C. (Q.B.) 168.
(3) (1876) 37 U. C. (Q.B.) 116.
(4) (1876) 37 U. C. (Q.B.) 51, 63.
(5) (1832) 3 B. & Ad. 409; 37 R. R. 454.
(6) (1834) 1 Ad. & E. 264, 280.
(7) (1793) 5 T. R. 182; 35 R. R. 633.
(8) (1699) 1 Ld. Raym. 471.
(9) (1780) 2 W. Bl. 1329.
(10) (1893) 22 S. C. R. 300.
(11) (1883) 8 App. Cas. 195.

the amount of assessment, not the legal liability to being assessed: see s. 71, sub-s. 1, of the Assessment Act.

C. Robinson, K.C., and *J. S. Fullerton, K.C.*, for the respondents, contended that the cars of the appellants were so actually or constructively affixed to their real property that they were an essential part thereof and assessable as real estate. It is not necessary that things should be stationary in order that they should be technically deemed fixtures: see *Farmer's Loan and Trust Co.* v. *Hendrickson* (1); *Lushington* v. *Sewell.* (2) They relied on the contention being res judicata. The cars in this assessment have been determined by the Court of Appeal to be real estate, and that decision was not appealed from. The procedure for trials of complaints against an assessment and the grounds on which such trials may be had are set out in the Assessment Act, ss. 71, 86. Sect. 84 says that the appeal to the Court of Appeal when it arises "shall be heard by three or more judges of the Court of Appeal, and the decision of such judges or a majority of them shall be final." The necessity for ascertaining and collecting taxes within the year is sufficient to explain the enactment of finality; and for many years the decisions of the Courts of the province and of the Canadian Supreme Court have upheld that finality. Reference was made to *Cushing* v. *Dupuy* (3); *Niagara Falls Suspension Bridge Co.* v. *Gardner* (4); *London Mutual Insurance Co.* v. *City of London.* (5)

Bicknell, K.C., replied.

The judgment of their Lordships was delivered by

LORD DAVEY. The principal question on this appeal is whether the cars used by the appellants on their system of electric tramways in the city of Toronto and adjoining municipalities are liable to be taxed as real estate. There is another question, whether the matter is res judicata between the parties.

The cars are the ordinary electric cars used on electric

(1) (1857) 25 Barbour, 484, 494.
(2) (1827) 1 Sim. 435.
(3) (1880) 5 App. Cas. 409.
(4) (1869) 29 U. C. (Q.B.) 194.
(5) (1887) 15 Ont. A. R. 629, 635.

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railways, and receive their motive power from an electric current passing through an overhead trolley wire. The power is transmitted to the motors below the trucks by means of a wheel at the end of a trolley pole on the top of the car body, which wheel is pressed up against the trolley wire by a spring. No part of the car is, of course, fixed in any sense either to the tram rails below or the trolley wire above.

The Assessment Act which was in force in the province of Ontario was c. 224 of the Revised Statutes of Ontario, 1897. By s. 39, sub-s. 2, of that Act, the personal property of the appellant company is exempt from assessment. And by s. 2, sub-s. 9, of the same Act, "land," "real property," and "real estate" respectively include all buildings or other things erected upon or affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty.

By the assessment made in 1901 for 1902, the real property of the appellants, consisting of rails, poles, tires, wires, cars, and other plant and material, being part of its railway system in and upon the streets, roads, and other public places and elsewhere in the city of Toronto, was assessed at $1,247,281. It is admitted that the cars in question are included in this assessment.

The council of the respondents in June, 1902, taxed the appellants the sum of $8775 in respect of the agreed value of the cars.

The appellants refused to pay this tax, and commenced the present action, in which they claimed a declaration that the cars were personal estate, and that the plaintiffs were not liable for the above sum of $8775, and an injunction to restrain the respondents from taking any proceedings for the collection of the said taxes. The respondents pleaded that in 1901 the street cars were legally assessable as real estate, and also relied on a decision of the Court of Appeal dated June 28, 1902, as res judicata between the parties.

The action was dismissed by Ferguson J., and an appeal from his judgment was also dismissed by the Court of Appeal on May 15, 1903. The present appeal is from the order then made.

No reasons were given either by Ferguson J. or the Court of Appeal, as it was admitted that the point of law as to the assessability of the cars as real estate was indistinguishable from the point decided by the Court of Appeal in the previous year. That decision appears to have been given on the authority of a case of *Bank of Montreal* v. *Kirkpatrick* (1), decided by the same Court of Appeal in 1901.

That was the trial of an interpleader issue between execution creditors of an electric street railway company and trustees for debenture-holders of the same company. The property purporting to be charged by the debentures in question included the rolling stock of the company, but the debenture deed was not duly registered as a chattel mortgage. The learned trial judge held that the rolling stock was an essential part of the railway, the latter being useless for any purpose without it, and, therefore, that it was real property covered as such by the mortgage. The Court of Appeal affirmed this judgment. Osler J., who delivered the judgment of the Court, held that the rolling stock of the electric railway really constituted part of one great machine confined to a particular locality for which it was specially constructed and fitted. Detached from the rails, he said, it was incapable of use, and upon the principles laid down in certain well-known cases on the law of fixtures he was of opinion that, as regards its liability to be taken in execution, it may properly be regarded as part of the corpus of the entire machine, and, therefore, in the nature of a fixture and passing with the land over which it ran.

In their case on this appeal the respondents submit that "the cars are so actually or constructively affixed to land or buildings as to render them real property and assessable as such," and this was the point argued before their Lordships. *Kirkpatrick's Case* (1) is not a direct authority in this case, which depends on the construction to be put on the Assessment Act; but the Court below evidently considered that the reasons given for the judgment in *Kirkpatrick's Case* (1) were equally applicable to the present one.

Their Lordships are always disposed to treat with great

(1) 2 Ont. L. R. 113.

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respect an unanimous decision of the Court of Appeal in Ontario on the construction of one of their own statutes, but they cannot accede to the argument addressed to them, or adopt the reasoning of Osler J. in *Kirkpatrick's Case* (1) without doing violence to the English language and to elementary principles of English law. It does not appear to them to advance the argument to describe the appellants' system of electric traction as a great machine, or by any other metaphorical expression. The subject of assessment is not the appellants' system or undertaking, but only that part of it which can properly be described as real estate. The cars are no doubt adapted for use in connection with the railway and trolley wires, but they are not part of the railway, and are not fixed in any sense whatever to anything which is real estate. Their Lordships cannot attach any legal meaning to the expressions "in the nature of fixtures," or "constructively affixed," except as an admission that the articles in question are not in fact fixtures or actually affixed. They are, therefore, of opinion that the cars remain and are personal estate only and are unassessable.

The decision of the Court of Appeal which is said to be res judicata arose out of a proceeding under the sections in the Assessment Act relating to the Court of Revision. By s. 62 a Revision Court of three persons is constituted, the jurisdiction of which is defined by s. 68, as follows: "At the time or times appointed, the Court shall meet and try all complaints in regard to persons wrongfully placed upon or omitted from the roll, or assessed at too high or too low a sum." By ss. 75 and 84 there is an appeal from the Court of Revision to the county court judge, or, where a person has been assessed to an amount aggregating $20,000, to a board consisting of the judges of the counties which constitute the county court district, and from that board to the Court of Appeal. The Act provides that the appeal shall be heard by three or more judges of the Court of Appeal, and the decision of such judges, or a majority of them, shall be final.

The appellants appealed to the Court of Revision against

(1) 2 Ont. L. R. 113.

the assessment of 1901 on the ground, amongst others, that the property enumerated was not liable to assessment as real property. The Court of Revision dismissed the appeal; and their decision was affirmed by the county court judges, and subsequently by the Court of Appeal.

It appears to their Lordships that the jurisdiction of the Court of Revision and of the Courts exercising the statutory jurisdiction of appeal from the Court of Revision is confined to the question whether the assessment was too high or too low, and those Courts had no jurisdiction to determine the question whether the assessment commissioner had exceeded his powers in assessing property which was not by law assessable. In other words, where the assessment was ab initio a nullity they had no jurisdiction to confirm it or give it validity. The order of the Court of Appeal of June 28, 1902, was not, therefore, the decision of a Court having competent jurisdiction to decide the question in issue in this action, and it cannot be pleaded as an estoppel.

This point was not argued in the Court of Appeal in the present case, as that Court only followed its own decision in the appeal from the Revision Court in the previous year. It is, therefore, a satisfaction to their Lordships to know that their decision is in accordance with the opinions expressed by learned judges in the Court of Appeal for Ontario and in the Supreme Court in other cases. In *Nickle* v. *Douglas* (1) the exact point arose. The appellant had unsuccessfully appealed to the Court of Revision, and it was held, after an elaborate examination of the previous authorities in the English and Canadian Courts, that that Court had no jurisdiction to decide any question whether particular property was assessable, and also that the party was not estopped by having previously appealed to the Revision Court. In *London Mutual Insurance Co.* v. *City of London* (2) the decision of the county court judge was treated as final, because the question was within the jurisdiction of the assessor; but Hagarty C.J. held that if the property had not been assessable that would have shewn that ab initio the assessor and the appellate tribunals had been

(1) 37 U. C. (Q.B.) 51. (2) 15 Ont. A. R. 629.

J. C. 1904

TORONTO RAILWAY v. TORONTO CORPORATION.

dealing with something beyond their jurisdiction, and their confirmation of the assessor's act would go for nothing; and Paterson J.A. expressed himself to the same effect. In the *City of London* v. *Watt & Sons* (1) the Chief Justice said: "I agree with the Court of Appeal in holding that the 65th section of the Ontario Assessment Act does not make the roll as finally passed by the Court of Revision conclusive as regards question of jurisdiction. If there is no power conferred by the statute to make the assessment it must be wholly illegal and void ab initio, and confirmation by the Court of Revision cannot validate it."

Their Lordships will, therefore, humbly advise His Majesty that the order of the Court of Appeal for Ontario of May 15, 1903, should be reversed, and instead thereof a declaration should be made and an injunction granted as claimed by the statement of claim, and the respondents should pay the costs in both Courts. The respondents will also pay the costs of this appeal.

Solicitors for appellants: *Harrison & Powell.*
Solicitors for respondents: *Freshfields.*

(1) 22 S. C. R. 300

[PRIVY COUNCIL.]

JOHNSON . . . . . DEFENDANT;

AND

THE KING . . . . . PLAINTIFF.

J. C.*

1904

June 1, 22, 29; *July* 19.

ON APPEAL FROM THE SUPREME COURT OF SIERRA LEONE.

Money had and received—Interest not recoverable—Costs in Action to which the Crown is a Party—Practice.

Applied. LEJZOR TEPER *v.* THE QUEEN [1952] A.C. 480

Although interest is recoverable both at law and in equity on money obtained by fraud and retained by fraud, yet in a case where the Crown as plaintiff intentionally put aside all question of fraud, and accepted repayment as money paid by mistake, no evidence being offered in the civil suit of fraudulent pretences which had been proved against the defendant in a Criminal Court:—

Held, that interest was not recoverable; and that the order appealed from, granting interest on the ground of special damage, must be reversed without costs.

In future the Board will adhere to the practice of the House of Lords, and the rule as to costs in cases between the Crown and a subject will be that the Crown neither pays nor receives costs unless the case is governed by some local statute, or there are exceptional circumstances justifying a departure from the ordinary rule.

APPEAL from an order of the Supreme Court (July 3, 1902).

The questions decided on this appeal were as to the right of the Crown to recover interest by way of damages for the wrongful detention by the appellant of moneys subsequently recovered from him, and also as to the costs of appeal.

On January 2, 1902, the action was brought. On February 18, 1902, the appellant having been convicted of having obtained by false pretences from the Army Paymaster, under the circumstances mentioned in the judgment of their Lordships, 8029*l.*, was sentenced to nine months' imprisonment. He paid the amount into court, and 1*s.* as damages for the detention thereof. The Court held in effect that there had been a breach by the defendant of an implied contract to pay back

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

J. C. 1904 JOHNSON v. REX.

to the plaintiff the money of the plaintiff which the defendant had received and detained, and that for that breach the plaintiff was entitled to recover as special damage for the loss of the use of the money during the periods of detention interest on the said sums of money for the said periods, and the judge gave judgment for the plaintiff for 428*l.* 13*s.* 3*d.* as damages by way of interest without costs.

Muir Mackenzie, for the appellant, contended that the award of interest was wrong. The evidence did not lay a foundation for such a claim as special damages. It was a claim for money had and received, and interest as special damages was not recoverable. Moreover, at the trial of the civil suit fraud and false representation had not been proved. There was no evidence except an admission of a conviction, and that was not evidence in the civil suit of fraud and false representation. Besides, the King sues and prosecutes in two different capacities, and therefore the conviction is not a judgment between the same parties. Even if fraud had been proved, interest was not recoverable. No contract express or implied to pay interest had been proved; and no demand for payment was proved coupled with a notice that interest would be claimed. Reference was made to *Havilland* v. *Bowerbank* (1); *Crockford* v. *Winter* (2); *De Bernales* v. *Fuller* (3); *Bell* v. *Free* (4); *Rishton* v. *Grissell* (5); *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (6)

It was contended that interest was not recoverable at law for money had, received, and detained unless the case came within 3 & 4 Will. 4, c. 42, s. 28. Nor is it recoverable in equity: *Page* v. *Newman* (7), cited in the *South Eastern Ry. Co. Case* (6); *Webster* v. *British Empire Mutual Life Assurance Co.* (8), per Cotton L.J.; *Smith* v. *Rummens* (9); *Hathaway* v. *Barrow* (10); *Blakemore* v. *Glamorganshire Canal Co.* (11)

(1) (1807) 1 Camp. 49.
(2) (1807) 1 Camp. 124.
(3) (1810) 2 Camp. 426; 11 R. R. 755.
(4) (1818) 1 Sw. 90; 18 R. R. 155.
(5) (1870) L. R. 10 Eq. 393.
(6) [1892] 1 Ch. 120; [1893] A. C. 429.
(7) (1829) 9 B. & C. 378; 33 R. R 204.
(8) (1880) 15 Ch. D. 169, 177.
(9) (1807) 1 Camp. 9.
(10) (1807) 1 Camp. 151.
(11) (1835) 2 C. M. & R. 133.

J. C. 1904 JOHNSON v. REX.

Sutton, for the respondent, contended that the money recovered was a Crown debt, and that the appellant was liable in damages to the Crown for its wrongful detention. If it was a private debt, even then in a case of fraud interest may be given: see *Frühling* v. *Schroeder* (1); *Sutton* v. *South Eastern Ry. Co.* (2) None of the cases cited on the other side touch a case of fraud; and see *De Bernales* v. *Wood* (3); *Burdick* v. *Garrick* (4); *Rex* v. *Wrangham* (5), followed by Parke B. in *Reg.* v. *Adams* (6) and by Chitty J. in *In re West London Commercial Bank* (7); *Rex* v. *Ward*, an old case reported in a note to the case in 2 Ex. 299. See also Price's Notes in Exchequer Practice, pp. 214, 215, with regard to the possession of public moneys. This money was fraudulently obtained and improperly detained: see 29 & 30 Vict. c. 39, s. 41.

Mackenzie replied.

1904 *June* 22.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. Isaac Babington Johnson, a Government contractor in Sierra Leone, who was the defendant in the action, appeals against a judgment of the Acting Chief Justice of the Colony ordering him to pay to His Majesty 428*l.* 13*s.* 3*d.*

The money in question represents interest on two sums which Johnson received from the Army Paymaster in excess of what was due, and which he retained in his own hands for over a year.

Under his contract with the Government Johnson was required to remove a quantity of granite stones from the Signal Hill to the Naval Coal Shed in Water Street, Freetown. For this service he was to be paid so much a ton. Between November 29, 1900, and January 9, 1901, he removed 298 tons and a fraction. His charge at the agreed rate ought to have been 448*l.* 1*s.* 7*d.* He presented a voucher for 2474*l.* 18*s.* 6*d.*, and received that sum from the Army Paymaster, thus obtaining

(1) (1835) 2 Bing. N. C. 77.
(2) (1865) L. R. 1 Ex. 32.
(3) (1812) 3 Camp. 259.
(4) (1870) L. R. 5 Ch. 233.
(5) (1831) 1 C. & J. 408; 35 R. R 753.
(6) (1848) 2 Ex. 299.
(7) (1888) 38 Ch. D. 364.

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2026*l.* 16*s.* 11*d.* beyond his due. Between December 31, 1900, and January 24, 1901, he removed in addition 138 tons and a fraction. His remuneration for that work ought to have been 207*l.* 8*s.* 5*d.* His claim was for the removal of 4140 tons. He presented a voucher for 6210*l.*, and actually received that sum from the Army Paymaster. The total amount overpaid was thus 8029*l.* 8*s.* 6*d.*

On January 2, 1902, a writ was issued in the name of His Majesty against Johnson claiming return of the money overpaid. The claim was put in two ways: (1.) return of money obtained by fraud; (2.) in the alternative, return of money paid by mistake.

The statement of claim in the action was delivered on February 5, 1902. It followed the lines on which the writ was framed. It dealt with the two cases of overpayment separately. In paragraphs 6, 8, and 9 it charged fraud, while in paragraphs 7 and 10 it presented the case as one of overpayment by mistake without alleging fraud. Then in paragraph 11 it was alleged that on February 5, 1902 (that is, the day on which the statement of claim purported to be delivered), the defendant was convicted of having obtained by means of false pretences from the Army Paymaster two several sums equal in the aggregate to the two sums actually overpaid. In paragraph 12 it was alleged that the plaintiff had "incurred great expense in prosecuting and obtaining the conviction of the said defendant for his said frauds," and had "suffered damage by the unlawful obtaining and detention of the said sums." The statement of claim concluded by claiming under paragraphs 6 and 7 and paragraphs 9 and 10 return of the two sums, which amounted together to 8029*l.* 8*s.* 6*d.* Under paragraph 11 it claimed 1200*l.* as damages.

By his statement of defence, which was delivered on February 14, 1902, Johnson admitted overpayment of two sums amounting to the sum of 8029*l.* 8*s.* 6*d.*, and tendered repayment. He denied fraud, and, accepting apparently the suggestion of the Crown indicated in paragraphs 7 and 10 of the statement of claim, he said the overpayments were due to mistakes which he attributed to certain officials or servants of

the Crown. The said sum of 8029*l.* 8*s.* 6*d.* was forthwith paid into court.

On February 18, 1902, Johnson was sentenced to nine months' imprisonment.

By his reply, delivered on February 19, 1902, the plaintiff said that he accepted the sum of 8029*l.* 8*s.* 6*d.* paid into court by the defendant "in satisfaction of the plaintiff's claim under paragraphs 7 and 10 of his said statement of claim"—the two paragraphs which treated the overpayments as due to mistake and not to fraud. At the same time he denied that the sum was sufficient to satisfy his claim arising under paragraphs 11 and 12 of his statement of claim.

The case went to trial. The Crown adduced no evidence except the statement of defence and Johnson's answers to interrogatories, which came to nothing more than an admission of his conviction and the sentence thereon.

At the trial the claim put forward on behalf of the Crown to recover the expenses of the prosecution and conviction was rejected or abandoned. As regards the claim for interest, it does not appear that the learned counsel for the Crown attempted to rest it on fraud. The learned counsel for the defendant pointed out that fraud had not been proved in the action. But the learned judge held that it was unnecessary to go into that point, as the defendant admitted "receiving the money by mistake or as overpayment." Consequently he thought the law would "imply a promise from defendant to pay back to the plaintiff the money paid in excess." He thought the allegation of special damage in the statement of claim sufficient, and gave "judgment for the plaintiff for 428*l.* 13*s.* 3*d.* damages by way of interest without costs."

Having regard to the law as settled by the judgment of the House of Lords in the case of *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (1), it is impossible to support the decision of the Acting Chief Justice on the ground upon which it was rested. Mr. Sutton, who argued on behalf of the Crown, admitted that the case was presented to this Board in a very unsatisfactory manner. He pointed out,

(1) [1893] A. C. 429.

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however, that the overpayments were so gross and indeed so monstrous in amount that it was impossible to believe in the absence of fraud. It would not be easy to resist that conclusion if their Lordships had to draw inferences of fact from the materials placed before them. But the difficulty is that the Crown seems intentionally and deliberately to have put aside all question of fraud. In the reply on behalf of the Crown the money paid into court was accepted in terms as money paid by mistake, and no attempt was made to give any evidence of the fraudulent pretences which had been proved to the satisfaction of the Criminal Court. Possibly, as was suggested, no evidence of fraud was given in the civil action because everybody concerned must have known all the facts of the case. This Board, however, has nothing before it but the evidence presented in the record. Having regard to the dates of the conviction, the payment into court, and the sentence, in connection with the reply delivered on behalf of the Crown, and considering that the punishment awarded does not seem to have erred on the score of severity, it is at least conceivable that there may have been some understanding or some expectation or hope held out that the question of fraud would not be further pressed. However that may be, the miscarriage, if miscarriage there be, is due entirely to the action of the Crown and the way in which the Crown has conducted the case. If the Crown intended to rely on fraud as giving a right to interest, the case ought to have been stated plainly and proved clearly.

In order to guard against any possible misapprehension of their Lordships' views, they desire to say that, in their opinion, there is no doubt whatever that money obtained by fraud and retained by fraud can be recovered with interest, whether the proceedings be taken in a Court of equity or in a Court of law, or in a Court which has a jurisdiction both equitable and legal, as the Supreme Court of Sierra Leone possesses under the Ordinance of November 10, 1881.

In order to support the decree it was suggested that Johnson, who was a trader, must have made a profit by the use of the money which was in his hands for a year. That is very probable, but there is no proof of it.

It was also suggested that Johnson as a "casual accountant" to the Crown was bound to account for the money with interest. But no authority was given in support of this proposition, and it appears that the records of the old Court of Exchequer which might have thrown some light upon this point are not readily accessible.

In the result, therefore, their Lordships are of opinion that the order appealed from ought to be reversed, and they will humbly advise His Majesty accordingly.

[Their Lordships having reserved the question of costs for further consideration, the subjoined addendum to their Lordships' judgment was delivered by Lord Macnaghten on July 19, 1904, after argument which was heard on June 29.]

Sutton, contended that costs of the appeal should not be given against the Crown. There were no favourable circumstances which would justify a departure from the ordinary rule that the Crown neither pays nor receives costs unless some local statute so directs. He cited *The Leda* (1); *Lord Advocate* v. *Lord Douglas* (2); *Smith* v. *Earl of Stair* (3); *Attorney-General* v. *Lord Ashburnham* (4); *Kane* v. *Reynolds* (5); *Reg.* v. *Belcher* (6); *Dyke* v. *Barton* (7); *Reg.* v. *Beadle* (8); *Mews* v. *Reg.* (9); *Justices of Middlesex* v. *Reg.* (10); *Attorney-General* v. *London Corporation.* (11) As regards cases in the King's Bench, see *King* v. *Archbishop of Canterbury.* (12) As regards Privy Council cases, there are many where the Crown has been ordered to pay costs, but mostly where the suit is by or against the Crown and another: see *Reg.* v. *Hughes* (13); *Rex* v. *Miles* (14); *Rolet* v. *Reg. and Another* (15); *George* v. *Reg. and Shaw* (16); also Sierra Leone cases, *Casaca* v. *Reg. and*

(1) (1863) Brown. & Lush. 19.
(2) (1842) 9 Cl. & F. 173.
(3) (1849) 2 H. L. C. 807.
(4) (1823) 1 S. & S. 394.
(5) (1854) 4 D. M. & G. 565.
(6) (1849) 6 Moo. P. C. 471.
(7) (1856) 10 Moo. P. C. 458.
(8) (1857) 7 E. & B. 492.
(9) (1882) 8 App. Cas. 339.
(10) (1884) 9 App. Cas. 757, 786.
(11) (1850) 2 Mac. & G. 247, 273.
(12) [1902] 2 K. B. 503, 569.
(13) (1866) L. R. 1 P. C. 81.
(14) (1797) 7 T. R. 367.
(15) (1866) L. R. 1 P. C. 198.
(16) (1866) L. R. 1 P. C. 389.

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Dunlop (1); *Reg. and Another* v. *Casaca* (2); *Cloete* v. *Reg.* (3)

Muir Mackenzie, for appellant, contended that under the local Ordinance there was power in this case to award costs. He referred to *Smith* v. *Reg.* (4), and to the Sierra Leone Ordinance 9 of 1881, par. 19. He referred also to the Crown Suits Act, 1855 (18 & 19 Vict. c. 90); *Reg.* v. *Beadle* (5); *Dyke* v. *Barton* (6); *Moore* v. *Smith.* (7) When the Crown comes in and takes the benefit of Procedure Acts it is liable in costs: *Smith* v. *Reg.* (8); *Reg. and Another* v. *Casaca* (2); *Callender, Sykes & Co.* v. *Colonial Secretary of Lagos.* (9)

As regards costs, their Lordships have heard a separate argument, and they desire to say that they are much obliged to the learned counsel on both sides for the industry and care which they have bestowed upon the question.

It will be enough to state the conclusions at which their Lordships have arrived.

It cannot be disputed that over and over again before this tribunal the Crown has been treated in the matter of costs just like a private litigant.

It appears, however, that no case can be found in which the point was argued.

All the cases seem to fall under one or other of the following three heads:—

1. Cases where the Crown has been treated as an ordinary litigant, under the authority of local statutes, as is generally the case in the self-governing Colonies.

2. Cases where the question arose under a petition of right or some proceeding analogous to a petition of right.

3. Exceptional cases where justice seemed to require that the Crown should pay costs, or where the Crown was not unwilling to be treated as an ordinary litigant.

The present case cannot be brought under any of these

(1) (1866) L. R. 1 P. C. 268.
(2) (1880) 5 App. Cas. 548.
(3) (1854) 8 Moo. P. C. 484, 492.
(4) [1898] A. C. 792, 798.
(5) 7 E. & B. 492.
(6) 10 Moo. P. C. 458.
(7) (1859) 1 E. & E. 597.
(8) (1878) 3 App. Cas. 614, 626.
(9) [1891] A. C. 460, 470.

heads. There is no Ordinance in Sierra Leone authorizing the Court to treat the Crown as an ordinary litigant, and the appellant has succeeded in spite of demerits.

Mr. Muir Mackenzie relied on s. 19 of the Ordinance of November 10, 1881, which declares that statutes of general application which were in force in England on January 1, 1880, should be in force in Sierra Leone from the date of the Ordinance coming into effect. He contended that that section imported into the Colony the Act 18 & 19 Vict. c. 90. Their Lordships, however, are of opinion that that Act is not a statute of general application within the meaning of s. 19 of the Ordinance in question. It only deals with proceedings in the United Kingdom.

In the result, therefore, their Lordships are of opinion that, in dealing with costs in cases between the Crown and a subject, this Board ought to adhere to the practice of the House of Lords, and that in future the rule should be that the Crown neither pays nor receives costs unless the case is governed by some local statute, or there are exceptional circumstances justifying a departure from the ordinary rule.

In the present case their Lordships think that the order appealed from should be reversed without costs, and that there should be no costs of the appeal.

Solicitors for appellant: *Redfern & Hunt.*
Solicitor for respondent: *The Treasury Solicitor.*

[PRIVY COUNCIL.]

J. C.* 1904 May 17, 18, 31; June 22.

TURNER AND ANOTHER . . . . . DEFENDANTS;

AND

HAJI GOOLAM MAHOMED AZAM . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT OF BOMBAY.

Law of Shipping — Time Charter — Sub-charter — Bills of Lading — Goods within Bill of Lading not subject to Charter Lien — Construction of Contract.

Under a time charter with power to sublet the shipowners retained legal possession of the ship through the captain appointed and paid by themselves, who was to be the agent in several respects for the charterers, and in particular to sign bills of lading at any rates of freight that they might direct "without prejudice to this charter," and they also were entitled to a lien upon all cargoes for freight or charter money due under the charter:—

Held, that bills of lading granted by the captain to the respondent, a sub-charterer from the charterers with notice of the time charter, were not mere receipts for goods, but contracts which bound the shipowners, and that the respondent, having paid his bill of lading freight, was entitled to his goods free of lien for the time charterer's dues.

Colvin v. *Newberry*, (1832) 1 Cl. & F. 283; 33 R. R. 437, distinguished.

Held, further, that the words "without prejudice to this charter" mean that the time charter remains unaltered as between the owners and the charterers, notwithstanding the bills of lading. They do not limit the power of the captain to issue bills of lading at different rates of freight, or entitle the shipowners to a lien on the goods comprised therein for freight payable under the time charter.

APPEAL from a decree of the Court of Appeal (April 19, 1901) reversing a decree of Russell J. (March 22, 1900).

The appellant Glanville was at all material times the registered managing owner of the steamship *Bombay*, and the appellant Turner her master. The *Bombay* was, by a charterparty dated August 20, 1898 (hereinafter called the time charter), let for six months to Messrs. Issabhoy Thaver & Co., and was by an agreement of August 26, 1898, which was subsequently embodied in a charterparty (hereinafter called the sub-charter) sublet by Messrs. Issabhoy Thaver & Co. to the respondent for a round voyage. By the time charter a lien was given to

* *Present:* LORD MACNAGHTEN, LORD LINDLEY, and SIR ARTHUR WILSON.

the owners of the *Bombay* upon all cargoes for freight or charter money due under the charter. The respondent had notice of the time charter and its terms.

During the currency of the time charter, that is to say on February 2, 1899, the *Bombay*, in prosecution of the round voyage for which she was sub-chartered to the respondent, arrived at Bombay having on board of her two consignments of sugar, one of 13,431 bags and the other of 17,076 bags, which had been shipped by the respondent at Mauritius, and in respect of which the respondent was himself the holder of the bills of lading. There was then due to the owners of the *Bombay* a month's hire amounting to Rs.18,000, equivalent to 1197*l.*, and for this freight or charter money the appellant Turner, on the instructions of his owners, exercised a lien on the said bags of sugar.

The respondent, on February 8, 1899, sued the appellant Turner and one Chabildas Lulloobhoy, afterwards changed to Glanville, as one of the owners of the *Bombay*. His prayer was for an order on the defendants for delivery to him of the said bags of sugar or for payment of five lacs of rupees, their value, and costs of suit, and such further or other relief as the nature of the case might require. The respondent alleged that the detention of the sugar was wrongful, that the bills of lading admitted that the freight was paid in Port Louis, and that he was entitled to receive delivery of the sugar without payment of any freight.

The appellant Turner by his written statement contended that he was lawfully entitled to exercise the lien given by the time charter for the hire of the steamer against the goods claimed by the plaintiff, and was also lawfully entitled to exercise a lien upon the said goods for freight for all the goods mentioned in the bills of lading specified in the list No. 3 annexed to the written statement. The appellant Turner also alleged that the respondent was aware of the terms of the time charter which conferred the lien, and, further, that he, the appellant Turner, was induced to sign the bills of lading without receiving any freight by a misrepresentation of the respondent's agents.

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The appellant Glanville by his written statement contended that all the cargo shipped by the plaintiff upon the said vessel was the subject of the lien given to the owners by the time charter, and that the captain rightly exercised the lien upon the cargo for the amount of Rs.18,000; and, further, that the captain had no authority to sign the bills of lading in the plaint mentioned without providing that the freight payable in respect of the goods shipped thereunder should be paid to the captain or the agents of the owner; and, further, that the signature of the captain to the said bills of lading was obtained at Mauritius by misrepresentation on the part of the agents of the respondent; and that without prejudice to any of the foregoing defences the respondent was bound to pay reasonable freight for the goods shipped under the bills of lading; and that the captain was justified in exercising a lien upon the goods of the respondent; and that the lien exercised by the captain was good at least for the amount of such freight.

The most material provisions of the time charter were as follows:—

By clause 4: That the charterers should pay for the use and hire of the vessel at the rate of 7*s.* 6*d.* per gross register ton per calendar month. This amounted to 1197*l.*, or Rs.18,000, per month.

By clause 8: That payment was to be made in cash monthly in advance to owners' agents in Bombay, and that in default of such payment the owners or their agent should have the faculty of withdrawing the said steamer from the service of the said charterers.

By clause 14: That the captain (although appointed by the owners) should be under the orders and direction of the charterers as regards employment, agency, or other arrangements. Bills of lading were to be signed at any rate of freight the charterers or their agents might direct without prejudice to this charter.

By clause 21: That charterers were to have the option of sub-letting the steamer.

By clause 22: That the owners should have a lien upon all cargoes for freight or charter money due under this charter.

The most material provisions of the sub-charter, under which freight was to be calculated upon the amount of cargo carried by the vessel from Saigon to Réunion, were :—

Clause 15 : The captain, if necessary, to sign bills of lading at any freight without prejudice to this charterparty.

Clause 24 : Time charterers to have a lien on the cargo for freight and demurrage (if any).

Russell J. declared by his decree that the appellants were entitled to the lien claimed, that the respondent was at all material times aware of the time charter and its terms, and that his goods were not exempt from the lien conferred by that charter; also that the bills of lading were signed by the master in the form employed without authority of the owners, and that the signature of the master was obtained by misrepresentation, and was affixed by mistake, and that the bills of lading had no validity as against the appellants. The learned judge further found that under any circumstances the respondent was not entitled to demand his cargo or to maintain the suit without tendering the amount due under the terms of the sub-charter, and that no tender was made by the respondent.

The Court of Appeal, on the contrary, declared that there was a lien against the respondent only for the balance of the sub-charter freight, which amount was to be determined thereafter; and that if on such inquiry it was found that the balance due was less than Rs.6000, then the respondent was to be entitled to damages to an amount to be ascertained. Further consideration and costs were reserved with liberty to apply.

With regard to the respondent having had knowledge of the time charter and its terms, the Court of Appeal was of opinion that this fact was in the circumstances immaterial, and that the shipowners having by the time charter authorized the sub-letting of the vessel, their lien was limited to the freight for which the time charterer had a lien—that is to say, for the freight due under the sub-charter. The Court was also of opinion that there had not been misrepresentation inducing the signing of the bills of lading, but in the view of the Court these bills of lading were mere acknowledgments of the

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receipt of the goods, and the rights of the parties were fixed by the sub-charter.

Carver, K.C., and *A. Adair Roche*, for the appellants, contended that this judgment was wrong, and that the judgment of Russell J. ought to be restored. They referred to *Hansen* v. *Harrold Brothers* (1), and contended that in the circumstances of this case the appellants were entitled to the lien which they claimed upon the respondent's goods. As regards the lien for the unpaid hire of the vessel, that was claimed by the appellants under the terms of the time charter of which the respondent at the date of shipment had notice. Notwithstanding, the power of the time charterers to sublet the vessel remained subject to the terms of the time charter, and accordingly both time charterer and sub-charterer, the latter having had effective notice or means of knowledge of its contents, were bound thereby: see especially clause 22. In the amount of lien, therefore, the appellants were not limited to the amount due under the sub-charter: see *Peek* v. *Larsen* (2) as to the effect of notice: *Ralli Brothers* v. *Paddington Steamship Co.* (3) Moreover, the terms of the sub-charter did not confer on the respondent any right to ship goods free from the operation of the lien conferred by the time charter. With regard to the relation to the shipowner of the man who ships his goods on board without contract except with the charterer, see *Delaurier* v. *Wyllie* (4); *Reynolds* v. *Jex* (5); *Small* v. *Moates*. (6)

Then with regard to the bills of lading, it was contended that they were signed by the master on the requirement of the respondent's agents claiming to be entitled thereto under the charterparty. They did not amount to an agreement with the respondent, or confer on him any right to have the goods free from the lien for unpaid hire. If the bills had any such effect, the master had no authority to sign them in that form. The only bills which he had power to sign were without prejudice

(1) [1894] 1 Q. B. 612; S.C. 63 L. J. (Q.B.) 744.

(2) (1871) L. R. 12 Eq. 378, 383.

(3) (1900) 5 Com. Cas. 124.

(4) (1889) 17 R. 167, 191.

(5) (1865) 34 L. J. (Q.B.) 251; S. C. 7 B. & S. 86.

(6) (1833) 9 Bing. 574, 579, 591–2; 35 R. R. 613.

to the time charter, i.e. subject to its terms. The evidence shewed that his signature was induced by misrepresentation of the respondent's agents, and was given under a mistake as to the facts. Under all the circumstances of the case, the bills of lading were mere receipts for goods put on board, and were not contracts which overrode the terms of the charters. The respondent had had no contract with the ship at all freed from the provisions including lien contained in the time charters.

J. A. Hamilton, K.C., and *Lauriston Batten*, for the respondent, contended that no right of lien had been made out in favour of the appellants as arising from any contract express or implied. The respondent's contract was with the time charterers. There was no proof that he knew the terms, but only the existence of the time charter. As regards the chartered hire, therefore, he was not a party to the time charter, nor bound by its terms. The respondent's liabilities were under his sub-charter. He made it on behalf of his firm in Mauritius, to whom he had paid his bill of lading freight on his own goods. They were discharged, therefore, of bill of lading freights. They were not subject to a lien for chartered freight either under the time charter or sub-charter; or if under the latter instrument, the respondent was always ready to discharge it. The respondent's contract was comprised in the sub-charter and bills of lading which the master had authority to make, and by those contracts he should be bound, free of all obligation under the time charter: see *Tharsis Copper Mining Co.* v. *Culliford* (1); *Small* v. *Moates* (2); *Gledstanes* v. *Allen.* (3) Misrepresentation was disproved, and the appellants were not entitled to repudiate the bills of lading, which were only such as the respondent was entitled to claim when he shipped the goods, and which bound the owners. Reference was made to *Kern* v. *Deslandes* (4); *Reynolds* v. *Jex* (5); and reliance was placed on *The Shillitto* (6); Carver's Carriage by Sea, s. 161. The real question is as to

(1) (1873) 22 W. R. 47.
(2) 9 Bing. 574, 579, 591–2; 35 R. R. 613.
(3) (1852) 12 C. B. 202.
(4) (1861) 10 C. B. (N.S.) 205.
(5) 34 L. J. (Q.B.) 251.
(6) (1897) 3 Com. Cas. 44, 46–48.

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the terms on which the goods were carried. The consignee was entitled to delivery on payment of an amount certain, which might be less than that due under the time charter. The master had authority to receive goods on any terms "without prejudice to the charterparty"—that is, without prejudice to any rights as between the owners and the time charterers. In other respects his powers were not limited. Accordingly the bills of lading were evidence of separate contracts with the shippers into which the terms of the charterparty were not incorporated, either by actual reference thereto or by force of the law of notice: see *Peek* v. *Larsen* (1); *Sewell* v. *Burdick* (2); *Leduc* v. *Ward* (3); *Rodoconachi* v. *Milburn* (4); *Haywood* v. *Brunswick Building Society*. (5)

Carver, K.C., replied.

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The judgment of their Lordships was delivered by

LORD LINDLEY. The question raised by this appeal is whether the appellants, who are shipowners, are entitled to a lien for freight payable under a time charter on the goods of the respondent, who was no party to that charter, but whose goods were carried in the appellants' ship under a sub-charter and bill of lading. The judge of first instance decided this question in favour of the appellants. His decision was reversed by the Court of Appeal in Bombay, and the present appeal is from the decision of that Court.

The undisputed facts are as follows:—

The appellant Glanville was the registered owner of the steamship *Bombay*, and the appellant Turner was her captain. By a charter dated August 20, 1898, and entered into by the agents of the owners and some Bombay merchants named Issabhoy Thaver & Co., the owners agreed to let and the charterers agreed to hire the ship for six calendar months. She was placed at their disposal with a full complement of officers and men at Bombay for employment in the Indian

(1) L. R. 12 Eq. 378.
(2) (1884) 10 App. Cas. 74, 105.
(3) (1888) 20 Q. B. D. 475, 479.
(4) (1886) 18 Q. B. D. 67.
(5) (1881) 8 Q. B. D. 403, 406.

Ocean and other Eastern waters as the charterers or their agents should direct, on certain conditions of which the following are important: (2.) The owners were to pay the captain and crew. (4.) The charterers were to pay freight monthly in advance at the rate of 7*s*. 6*d*. per ton, which came to Rs.18,000. (8.) In default of such payment the owners were entitled to withdraw the steamer from the service of the charterers without prejudice to any claim the owners might otherwise have against them. (14.) The captain, although appointed by the owners, was to be under the orders and directions of the charterers as regards employment, agency, or other arrangements. Bills of lading were to be signed at any rate of freight the charterers or their agents might direct without prejudice to that charter, and the captain was to attend daily, if required, at their offices to do so. The charterers were to indemnify the owners from all consequences or liabilities that might arise from the captain doing so except for short delivery. (21.) The charterers were to have the option of sub-letting the steamer. (22.) The owners were to have a lien upon all cargoes for freight or charter money due under the charter, and the charterers were to have a lien on the ship for all moneys paid in advance and not earned.

The 14th, 21st, and 22nd conditions are those which have given rise to the controversy between the parties; but before considering them it will be convenient to state what was done, and, for the purpose of avoiding confusion, the charterers under this charter will be referred to as the "time charterers" in order to distinguish them from the respondent, who is their sub-charterer.

Shortly after the time charter was made the ship was sub-chartered to the respondent for a round voyage from Saigon to Réunion and back from Mauritius to Bombay. She was to take rice from Saigon to Réunion and sugar from Mauritius to Bombay. Freight was to be payable for the whole voyage at the rate Rs.1 8*a*. per bag of 168 lbs., calculated only on the cargo shipped from Saigon to Réunion. There was to be no freight payable by the sub-charterer to the time charterer for any other cargo. On account of the freight thus estimated,

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Rs.37,500 were to be paid at Bombay before the steamer sailed from Saigon, Rs.25,000 at Réunion or Mauritius, and the balance was to be paid at Bombay after delivery of the cargo there.

It will be observed that neither of these documents took the ship out of the legal possession of the owners so as to deprive them of the power of detaining goods on board, and of enforcing any lien to which they might be entitled. The captain retained possession for the owners, and was in a position to enforce the lien expressly conferred by the time charter if it was properly enforceable against the goods in question.

The steamer completed this voyage, and on February 2, 1899, she arrived at Bombay, having on board a quantity of sugar put on board by the sub-charterer at Mauritius, and for which he had received bills of lading from the captain. The freight payable by these bills of lading was at the rate of 6 annas per 75 kilograms, and this freight was prepaid by the sub-charterer in Mauritius, so that when the ship arrived in Bombay nothing remained to be paid by the sub-charterer to the owners in respect of the bill of lading freight. It appears, however, that something was due from the sub-charterer to the time charterers for money payable under the sub-charter.

There was also due to the owners a month's freight, i.e., Rs.18,000 (1197*l.*), from the time charterers under the time charter, and the owners claimed a lien for this amount on the sub-charterer's sugar. Hence the dispute between the parties. The sub-charterer brought an action to recover his sugar, or its value, and damages for its detention, and the shipowners defended the action relying on their lien.

So far there is no dispute about the facts. The shipowners, however, also defended the action upon the ground of misrepresentation alleged to have been made by the sub-charterer to the captain before the sugar was shipped, and on the faith of which he is said to have signed the bills of lading.

This alleged misrepresentation was denied, and a considerable amount of evidence upon it was adduced. The judge of

first instance thought the defence proved. But the Court of Appeal took a different view. The evidence has again been laid before their Lordships, and they have carefully considered it. It appears that the sub-charterer had paid to the agents of the shipowners some of the freight payable in advance under the time charter, and there was undoubtedly some misunderstanding on the part of the captain as to similar payments being made in future. But their Lordships are not satisfied that the sub-charterer made any false statement to the owners' agents or to the captain, nor any representation or promise which could confer on the owners any lien on the sub-charterer's goods other than such as the documents above referred to entitle them to assert.

Their Lordships, however, agree with both Courts in India in their conclusion that the sub-charterer knew, in a general way, of the time charter, and that the freight payable under it by the time charterers was Rs.18,000, payable monthly in advance.

Bearing these conclusions in mind, their Lordships will consider the legal position of the parties.

The first question which arises is the effect of the bills of lading. Apart from them, there was no contract between the shipowners and the sub-charterer. But he shipped his sugar on board the steamer on the terms of those bills of lading, and the captain was authorized by the time charter to sign them. Whether he signed them for the shipowners or for the sub-charterer he had express authority from the shipowners to sign them. Under these circumstances the shipowners appear to their Lordships to have contracted with the sub-charterer that his sugar should be carried to Bombay in that ship on the terms of the bills of lading. This distinguishes the present case from *Colvin* v. *Newberry* (1), where the bill of lading given by the captain of a chartered ship was held to bind the charterer only, although the shipowners retained possession of the ship by the captain. Nor is the present case governed by *Small* v. *Moates* (2) and others of that class, where the holder

(1) 1 Cl. & F. 283; 33 R. R. 437. (2) 9 Bing. 574; 35 R. R. 613.

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of the bill of lading had no better title than the charterer who was himself the captain of the ship and the original shipper of the goods.

It further appears to their Lordships that the bills of lading in this case are not mere receipts for goods given to a charterer already bound to the shipowner by a charterparty entered into between them and which the captain had no authority to depart from.

Unless, therefore, the fact that the sub-charterer had notice of the time charter makes a difference, the bills of lading entitled him to have his goods delivered to him on payment of the bills of lading freight. This was decided in *Fry* v. *Chartered Mercantile Bank of India* (1), which was followed in *Gardner* v. *Trechmann*. (2) In both of these cases the bill of lading expressly referred to the charterparty, but not in such a way as to incorporate either the obligation to pay the charter freight or the lien for it.

These cases, and others like them, shew that notice by a shipper of a charterparty has not the effect of incorporating into the bill of lading any terms which are inconsistent with it and which the captain was not bound to embody in the bill of lading. If the charterparty shews that the captain exceeded his authority in signing the bill of lading, and the shipper knew this, he cannot enforce the terms of the bill of lading uncontrolled by the charterparty. If the shipper knew that there was a charterparty, and had an opportunity of reading it, and did not trouble himself about it, he might be treated as knowing its contents. In the present case the time charterer had authority to let other persons have the use of the ship for six months for any voyage in the waters mentioned in the time charter. The captain was not only empowered to sign but was bound to sign bills of lading at any rate of freight which the charterers or their agents might direct, but without prejudice to that charter. These words introduce a difficulty. It is said that they limit the authority of the captain to sign bills of lading which do not preserve to the owners the power

(1) (1866) L. R. 1 C. P. 689. (2) (1884) 15 Q. B. D. 154.

to withdraw the ship under condition 8 of the time charter and their lien on all goods under condition 22. This construction is a possible construction, but it has long ago been rejected both by commercial men and by judicial decision.

There can be no doubt that the sub-charterer must for this purpose be regarded as an agent of the charterer. The words "without prejudice to this charter" mean that the rights of the shipowners against the time charterers, and vice versâ, are to be preserved. That this is the true meaning and legal effect of the words "without prejudice to this charter" has often been the subject of controversy and of judicial decision, and has long been treated as settled by authority. In *Hansen* v. *Harrold Brothers* (1) Lord Esher said its meaning was "that it is a term of the contract between the charterers and the shipowners that, notwithstanding any engagements made by the bills of lading, that contract shall remain unaltered." It means no more. Condition 8 in the time charter, empowering the owners to withdraw the ship, cannot mean that, after the captain has shipped goods for Bombay and given bills of lading for them to persons other than the time charterers, the owners can refuse to allow the ship to go to Bombay and deliver the goods there as agreed by the bills of lading. So as regards condition 22 giving a lien upon all cargoes for freight or charter money due under that charter. This is a stipulation binding on the time charterer, and gives the shipowner a more extensive lien than he would have for freight payable in advance. But this clause does not override or limit the power of the captain to issue bills of lading at different rates of freight, or entitle the shipowners to a lien on the goods of persons who have come under no contract with them conferring a lien for the freight payable under the time charter. A right to seize one person's goods for another person's debt must be clearly and distinctly conferred before a Court of justice can be expected to recognise it.

If their Lordships had taken a different view of the legal effect of the bills of lading there might have been more difficulty

(1) [1894] 1 Q. B. 612.

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in the case, for there is great force in Mr. Carver's argument that, if the bills of lading were mere receipts for goods put on board, the sub-charterer could have had no greater rights than those which the time charterers had themselves. It is not, however, necessary to solve the difficulties which would have arisen if there had been no bills of lading. For the reasons above stated their Lordships are of opinion that the claim of the shipowners cannot be supported, and that the order appealed from ought to be affirmed.

Their Lordships observe that the Court of Appeal gave the shipowners the benefit of any lien which the time charterers had on the goods of the sub-charterer. This seems right, and the sub-charterer's counsel did not contend that it was not.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal, and the appellants must pay the costs.

Solicitors for appellants: *Maples, Teesdale & Co.*

Solicitors for respondent: *Waltons, Johnson, Bubb & Whatton.*

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1904, will be as follows :—

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COMPANY—*Call unpaid—Forfeited Shares, Sale of—Power to make fresh Call on Purchaser—Certificate—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *Sched.* 1, *Table A*, *art.* 22.

When shares which have been forfeited for non-payment of a call are sold, and a certificate of proprietorship is delivered to the purchaser under art. 22 of Table A of the Companies Act, 1862, stating that he is to be deemed to be the holder of the shares "discharged from all calls due prior to the date" of the certificate, he is liable for the payment of future calls duly made.

The decision of the Court of Appeal, *Randt Gold Mining Co.* v. *New Balkis Eersteling, Ld.*, [1903] 1 K. B. 461, affirmed. NEW BALKIS EERSTELING, LD. *v.* RANDT GOLD MINING CO.
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2. —— *Mortgage—Assignment of Present and Future Book Debts—Registration of Mortgage—"Floating Charge"—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 14, *sub-s.* 1 (*d*).

A company, by way of security to guarantors, assigned by deed all its present and future book and other debts, with the benefit of all securities for the same, to a trustee in trust for the guarantors. The deed contained no express provision against possession being taken by the trustee, but declared that the trustee should at any time, if required by the guarantors, give notice of this assignment to the company's debtors, but that it should not be incumbent on the trustee to give notice unless he thought fit; with provisions that the trustee might at any time give notice, appoint a receiver and exercise the statutory power of sale, but meanwhile should not be

COMPANY—*continued.*

answerable for allowing the company to receive the book debts:—

Held, that upon the true construction of the deed it was clearly intended that the company should carry on its business in the ordinary way and receive the book debts for that purpose, and that the deed was "a floating charge" within the meaning of s. 14 of the Companies Act, 1900, and void for want of registration in a question between the trustee and a creditor of the company.

The decision of the Court of Appeal, *Houldsworth* v. *Yorkshire Woolcombers Association, Ld.*, [1903] 2 Ch. 284, affirmed. ILLINGWORTH *v.* HOULDSWORTH - - - H. L. (E.) 355

3. —— *Prospectus—Omission of Contract—Untrue Statement — Fraud — "Deemed to be Fraudulent"—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38—*Directors Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3, *sub-s.* 1.

A director of a limited company knew that a prospectus issued by the directors did not disclose a contract and a resolution of the board of directors which were in fact material but which he was advised were not, and which he honestly believed not to be material. A shareholder who had subscribed for shares in the company having brought an action against the director for misrepresentation:—

Held, that though the director was not in fact fraudulent, he must be "deemed to be fraudulent" within s. 38 of the Companies Act, 1867, and that proof that the plaintiff took shares upon the faith of the prospectus would make the director liable both under the Act of 1867 and the Directors Liability Act, 1890, s. 3, sub-s. 1.

The decision of the Court of Appeal, *Broome* v. *Speak*, [1903] 1 Ch. 586, affirmed. SHEPHEARD *v.* BROOME - - - - H. L. (E.) 342

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COMPROMISE—*Power of Court to bind Absent Persons—Extent of Jurisdiction—Practice—Rules of Supreme Court, Order XVI., r.* 9A.

An action having been brought on behalf of the holders of bonds (payable to bearer), issued

COMPROMISE—*continued.*
by a railway company, against the trustees for the bondholders and the company, the Court in 1894 sanctioned a scheme for the compromise of the action, under which all the bondholders should receive a certain sum in respect of each bond delivered up to be cancelled, and ordered that the scheme should be binding on all the bondholders who were not parties to the proceedings:—

Held, that the Court had jurisdiction to make an order on the holders of outstanding bonds whose names and addresses had not been discovered, to come in within a period of six months and accept the sum per bond, or be excluded from the benefit of the scheme.

The decision of the Court of Appeal, reported as *Collingham* v. *Sloper*, [1901] 1 Ch. 769, reversed. SARAGOSSA AND MEDITERRANEAN RAILWAY COMPANY *v.* COLLINGHAM - **H. L. (E.) 159**

CONCESSION—Deed of—Construction of covenant—Lands in possession of the Crown—Law of Trinidad and Tobago - **415**
See PRIVY COUNCIL APPEALS. 34.

CONCURRENT JUDGMENTS—Practice. - **73**
See SCOTTISH LAW. 1.

CONDITION—To take over sheep at expiration of lease—Forfeiture of lease - - **217**
See SCOTTISH LAW. 4.

CONTRACT—Appropriation of goods to—Bankruptcy of manufacturer — Right of Trustee—Ship - - - **223**
See SALE OF GOODS.

—— Company before incorporation—Rights of company - - - - **120**
See PRIVY COUNCIL APPEALS. 18.

—— Determination—Contract to execute works—Wrongful seizure of works by defendants — Plaintiff entitled to determine the contract - - - **442**
See PRIVY COUNCIL APPEALS. 28.

—— Prospectus—Omission of contract—Untrue statement—Fraud—Directors' liability
See COMPANY. 3. **342**

CONVICTIONS—Review of martial law—Jurisdiction - - - - **114**
See PRIVY COUNCIL APPEALS. 14.

COPYRIGHT — *Encyclopædia — Article — Author and Publisher—Copyright in Contributions—Inference of Fact—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 3, 18.

Where the proprietor of an encyclopædia employs and pays another person to compose articles for publication in the encyclopædia, the question whether the copyright in the articles belongs to the proprietor within s. 18 of the Copyright Act, 1842, depends on an inference of fact—not law—to be drawn by a reasonable man from the nature of the contract and all the circumstances. The contract need not be in writing; no express words need be used; and the inference that the copyright was intended to belong to the proprietor may be fairly drawn where there are no special circumstances and the only material facts are the employment and the payment.

COPYRIGHT—*continued.*
Sweet v. *Benning*, (1855) 16 C. B. 459, followed.

The decision of the Court of Appeal, [1903] 1 Ch. 318, reversed and the question what the words "separately published" mean in s. 2 left open. LAWRENCE & BULLEN, LIMITED *v.* AFLALO AND COOK - - **H. L. (E.) 17**

CORPORATION—Guarantee of debentures by a municipality — Invalidity of by-law—Quebec Act - - - - **789**
See PRIVY COUNCIL APPEALS. 12.

—— Libel by servant of—Liability of company for malicious libel - - - **423**
See PRIVY COUNCIL APPEALS. 23.

COSTS—Action, arbitration, and award—Law of New South Wales - - - **795**
See PRIVY COUNCIL APPEALS. 20.

—— Appeal—Omission in petition for special leave—Final judgment—Yukon Territorial Act - - - - **429**
See PRIVY COUNCIL APPEALS. 7.

—— Compensation, Action for — New South Wales Public Works Act - - **259**
See PRIVY COUNCIL APPEALS. 22.

—— Lease—Renewal "at the costs of the lessee"—Costs of reference and award as to amount of fine - - - **46**
See LANDLORD AND TENANT.

—— Money had and received—Interest—Costs in action to which the Crown is a party—Appeal from Sierra Leone - **817**
See PRIVY COUNCIL APPEALS. 33.

COUNTY—Remuneration of Procurator Fiscal—Preliminary inquiries into non-prosecuted cases - - - - **235**
See SCOTTISH LAW. 5.

COVENANT—Deed of concession—Construction of covenant—Lands in possession of the Crown—Law of Trinidad and Tobago
See PRIVY COUNCIL APPEALS. 34. **415**

CREDITOR—Secured creditor, Proof by against the real estate—Lapse of time—Fund in court - - - - - **1**
See ADMINISTRATION.

CRIMINAL LAW—Review of martial law—Convictions by Supreme Court—Jurisdiction
See PRIVY COUNCIL APPEALS. 14. **114**

CROWN—Costs in action to which the Crown is a party—Appeal from Sierra Leone **817**
See PRIVY COUNCIL APPEALS. 33.

—— Crown grant, Construction of—Confirmation of doubtful title - - - **273**
See PRIVY COUNCIL APPEALS. 21.

—— Deed of concession—Construction of covenant—Lands in possession of the Crown—Law of Trinidad and Tobago - **415**
See PRIVY COUNCIL APPEALS. 34.

—— Mussel fishings—Crown rights - **364**
See SCOTTISH LAW. 3.

CROWN LANDS — Swamp lands — Transfer of proprietary right—Canadian Act **799**
See PRIVY COUNCIL APPEALS. 9.

DAMAGE — Ancient lights — Prescription — Measure of right—Angle of 45 degrees —Inquiry as to damage, Refusal of
See LIGHT AND AIR. 179

DAMAGES—Trespass on Licensee's land before licence granted—Newfoundland, Laws of—Effect of grant of licence - 405
See PRIVY COUNCIL APPEALS. 31.

DEBENTURES—Guarantee of, by a municipality —Invalidity of by-law—Quebec Act
See PRIVY COUNCIL APPEALS. 12. 789

DEDICATION—Locks—Stanch—Royal Charter, Validity of—Implied obligation to maintain and repair - - - 476
See WATER HIGHWAY.

DEFAMATION—Libel by servant of corporation —Liability of company for malicious libel - - - - - 423
See PRIVY COUNCIL APPEALS. 23.

DIRECTOR—Prospectus—Omission of contract—Untrue statement—Fraud — Directors' liability - - - - 342
See COMPANY. 3.

DISCHARGE—Of judgment by consent—Practice —Compensation—Employers' liability
See HOUSE OF LORDS. 1. 379

DIVIDED PARISHES AND POOR LAW - 40
See POOR LAW.

DIVIDEND—Surplus profits — Making up deficiency of previous dividend—Prescribed rate - - - - - 27
See WATER. 3.

DOMICIL—*Domicil of Origin — Abandonment — Acquiring fresh Domicil — Evidence — Onus of Proof.*

The onus of proving that a domicil has been chosen in substitution for the domicil of origin lies upon those who assert that the domicil of origin has been lost. The domicil of origin continues unless a fixed and settled intention of abandoning the first domicil and acquiring another as the sole domicil is clearly shewn.

An American citizen left the United States and lived many years in England, where he died, leaving by will a legacy on which the Crown claimed legacy duty, on the ground that the testator had acquired a domicil in England:—

Held, that the onus of shewing a change of domicil was upon the Crown, and (Lord Lindley dissenting) that the proof of a fixed and settled purpose was not clearly made out, and that legacy duty was not payable.

The decision of the Court of Appeal reversed.
WINANS *v.* ATTORNEY-GENERAL H. L. (E.) 287

DUTY—Public revenue.
See under REVENUE.

ECCLESIASTICAL LAW — *Clergy Discipline — Immoral act — Construction — Clergy Discipline Act*, 1892 (55 & 56 *Vict. c.* 32), *s.* 2.

Held, that the collection of alms on false and fraudulent pretences is an immoral act within the meaning of the Clergy Discipline Act, 1892.
FITZMAURICE *v.* HESKETH - - P. C. 266

ECCLESIASTICAL LAW—*continued.*

2. —— *Clergy Discipline—Occasional Swearing and Ribaldry—Clergy Discipline Act*, 1892 (55 & 56 *Vict. c.* 32), *s.* 2.

Held, that on the true construction of the Clergy Discipline Act, 1892, s. 2, habitual swearing and ribaldry is immoral conduct and an offence thereunder, but it is not established by evidence of occasional use of language of that character. MOORE *v.* BISHOP OF OXFORD
P. C. 283

3. —— *Clergy Discipline—Petition for leave to appeal—Enlargement of Time — Clergy Discipline Act*, 1892.

In order to obtain an enlargement of time to appeal, as limited by the rules made under the Clergy Discipline Act, 1892, a perfect explanation must be given of the delay incurred. LEE *v.* ATHERTON - - - - P. C. 805

4. —— *Trust — Church — Identity — Fundamental Doctrines—Limits to Power of Union.*

The identity of a religious community described as a Church consists in the identity of its doctrines, creeds, confessions, formularies, and tests.

The bond of union of a Christian association may contain a power in some recognised body to control, alter, or modify the tenets or principles at one time professed by the association; but the existence of such a power must be proved.

The denomination of Christians which called itself the Free Church of Scotland was founded in 1843. It consisted of ministers and laity who seceded from the Established Church of Scotland, but who professed to carry with them the doctrine and system of the Established Church, only freeing themselves by secession from what they regarded as interference by the State in matters spiritual. Two main fundamental doctrines which the appellants, the minority of the Free Church, asserted that the seceders in 1843 carried with them and issued in their Claim, Declaration, and Protest to their supporters and benefactors in that year to stand for all time were the Establishment principle, and the unqualified acceptance of the Westminster Confession of Faith, and they further asserted that these doctrines were part of the constitution of the Church and could not be altered. In 1843 and subsequent years the response to the appeal for funds was most bountiful, and the Free Church was endowed by the liberality of its members, the property being secured under what was called a "Model Trust Deed." For many years efforts had been made to bring about a union between the Free Church and the United Presbyterian Church, also seceders from the Established Church, but a Church pledged to disestablishment. In 1900 Acts of Assembly were passed by the majority of the Free Church and unanimously by the United Presbyterian Church for union, under the name of the United Free Church, and the Free Church property was conveyed to new trustees for behoof of the new Church. The United Presbyterian Church was opposed to the Establishment principle, and did not maintain the Westminster Confession of Faith in its entirety. The Act of Union left ministers and laymen free to hold opinions as regards the Establishment principle

ECCLESIASTICAL LAW—*continued.*
and the predestination doctrine (in the Westminster Confession) as they pleased. The respondents contended that the Free Church had full power to change its doctrines so long as its identity was preserved. The appellants, a very small minority of the Free Church, objected to the union, maintaining that the Free Church had no power to change its original doctrines, or to unite with a body which did not confess those doctrines, and they complained of a breach of trust inasmuch as the property of the Free Church was no longer being used for behoof of that Church. And they brought this action in the name of the General Assembly of the Free Church asking substantially for a declarator that they, as representing the Free Church, were entitled to the property:—

Held, reversing the decision of the Second Division of the Court of Session (Lords Macnaghten and Lindley dissenting, (1902) 4 F. 1083), that the Establishment principle and the Westminster Confession were distinctive tenets of the Free Church; that the Free Church had no power, where property was concerned, to alter or vary the doctrine of the Church; that there was no true union, as the United Free Church had not preserved its identity with the Free Church, not having the same distinctive tenets; and that the appellants were entitled to hold for behoof of the Free Church the property held by the Free Church before the union in 1900.

By Lord Macnaghten: (1) That the Free Church when it came into existence claimed the power of altering and amending its Confession of Faith, and accordingly could declare the Establishment principle an open question, and could relax the stringency of the formula required from ministers and others; (2) that provision for expansion and development was part and parcel of the original trust under which the Free Church funds had been collected, and that there had been no breach of trust.

By Lord Lindley: That any interpretation of the Scripture or of the subordinate standards bonâ fide adopted by the General Assembly of the Free Church, and held by them better to express the doctrine intended to be expressed by the language used in the Confession, was not beyond the power of the Free Church, and that there was no breach of trust. GENERAL ASSEMBLY OF FREE CHURCH OF SCOTLAND *v.* LORD OVERTOUN. MACALISTER *v.* YOUNG
H. L. (Sc.) 515

EDINBURGH WATER ACT—Right of support for water pipe—Minerals under pipe **64**
See WATER. 2.

"ELDEST SON OF MY SISTER"—Will—Construction—Lapsed gift - - **268**
See PRIVY COUNCIL APPEALS. 17.

ELECTION — Alternative liability — Judgment signed against one of two defendants
See HUSBAND AND WIFE. **11**

ELECTRIC CARS — Not real estate — Personal estate exempt from assessment - **809**
See PRIVY COUNCIL APPEALS. 10.

EMPLOYER AND WORKMAN—*Compensation—"Earnings" — Lodging Allowances — Railway Guard — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), 1*st Schedule* (*a*), (*i*).

A railway guard was paid in addition to his wages a fixed sum whenever his duties required him to lodge away from home. No inquiry was made whether he spent that sum or any sum:—

Held, that these fixed sums were part of his "earnings" within the meaning of the Workmen's Compensation Act, 1897, 1st Schedule.

The decision of the Court of Appeal, *Sharpe* v. *Midland Ry. Co.*, [1903] 2 K. B. 26, affirmed. MIDLAND RAILWAY COMPANY *v.* SHARPE.
H. L. (E.) 349

—— Libel by servant of corporation—Liability of company for malicious libel - **423**
See PRIVY COUNCIL APPEALS. 23.

—— Practice—Discharge of judgment by consent — Compensation — Employers' liability - - - - **379**
See HOUSE OF LORDS. 1.

ENCYCLOPÆDIA — Author and publisher — Copyright in contributions—Inference of fact - - - - **17**
See COPYRIGHT.

ENTAIL—Restriction—Provision for widow — Deduction from free rental - **50**
See SCOTTISH LAW. 2.

EQUITY OF REDEMPTION—Clog on—Option to purchase mortgaged stock—Company
See MORTGAGE. **323**

ESTATE DUTY—Principal value—Tenant for life indemnified against mortgage debt
See REVENUE. 1. **316**

ESTOPPEL—Determination that street is a highway—Res judicata - - - **31**
See STREETS.

EVIDENCE—Domicil of origin—Abandonment—Acquiring fresh domicil—Onus of proof - - - - - **287**
See DOMICIL.

FINAL JUDGMENT.
See under JUDGMENT.

FINANCE ACTS.
See under REVENUE.

FISHINGS—Mussel fishings—Crown rights **364**
See SCOTTISH LAW. 3.

FIXTURES—*Machinery attached to Freehold—Presumption of Law—Trade Fixtures—Mortgage—Hire-purchase Agreement—Rights of Mortgagee against Owner of Machinery—Licence to remove Trade Fixtures—Entry of Mortgagee into Possession.*

Machines were supplied by the owner of them to the lessee of a factory upon the hire-purchase system, the machines to remain the property of the owner till they had been wholly paid for; upon default in payment the owner to have power to determine the hiring and remove the machines. They were affixed, as the owner knew, to concrete beds in the floor of the factory by bolts and nuts, and could have been removed

FIXTURES—*continued.*
without injury to the building or the beds. The lessee made default in payment, and the owner brought an action to recover the machines or their value from a mortgagee of the premises who had taken possession:—
Held, that the machines had been so affixed as to pass by the mortgage to the mortgagee.
The decision of the Court of Appeal, [1903] 1 K. B. 87, affirmed. REYNOLDS *v.* ASHBY & SON - - - - - H. L. (E.) 466

FORFEITURE—Lease—Condition to take over sheep at expiration of lease - 217
See SCOTTISH LAW. 4.

—— Shares — Call unpaid — Forfeited shares, Sale of—Power to make fresh call on purchaser - - - - - 165
See COMPANY. 1.

FORMÂ PAUPERIS—Special leave to appeal in —Certificate of counsel - - 149
See PRIVY COUNCIL APPEALS. 30.

FRAUD — Prospectus — Omission of contract — Untrue statement—Directors' liability
See COMPANY. 3. 342

GAS—*Arrears of Gas Rate—Right to recover from incoming Tenant — Gasworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 15), *s.* 16—*Metropolis Gas Act*, 1860 (23 & 24 *Vict. c.* 125), *s.* 39—*Gas Light and Coke Company's Act*, 1872 (35 & 36 *Vict. c. xxiii.*), *s.* 18.
When a consumer of gas supplied by the Gas Light and Coke Company on premises within the company's district leaves the premises without paying for the gas, and the incoming tenant continues the trade or business of the outgoing consumer and pays him a consideration for so doing, the company cannot under its special Act of 1872, c. xxiii., recover by legal process the arrears from the incoming tenant.
The decision of the Court of Appeal, *Gas Light and Coke Co.* v. *Cannon Brewery Co.*, [1903] 1 K. B. 593, reversed, and the decision of Lord Alverstone C.J., Darling and Channell JJ., restored.
Gas Light and Coke Co. v. *Mead*, (1876) 45 L. J. (M.C.) 71, approved. CANNON BREWERY COMPANY *v.* GAS LIGHT AND COKE COMPANY H. L. (E.) 331

GOODS—Sale of.
See under SALE OF GOODS.

GUARANTEE—Debentures by a municipality—Invalidity of by-law—Quebec Act 789
See PRIVY COUNCIL APPEALS. 12.

HIGHWAY—Creation of urban district—Subtraction of parish from rural district—Highway expenses—Loss of income 171
See LOCAL GOVERNMENT.

—— Streets.
See under STREETS.

—— Water highway.
See under WATER HIGHWAY.

HIRE-PURCHASE AGREEMENT — Trade fixtures—Mortgage—Rights of mortgagee against owner of machinery—Presumption of law - - - - 466
See FIXTURES.

HOUSE OF LORDS — *Practice — Discharge of Judgment by Consent—Compensation—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42).
Where upon an appeal to the House of Lords the respondent petitions that the judgment of the Court below should be discharged and the case sent back for trial, the consent of both parties to that course must be brought before the House itself. WILLIAM HANNAH *v.* JAMES HUNTER - - - H. L. (Sc.) 379

2. —— *Practice—Reversal—Point not argued.*
The defendants in an action relating to a piece of ground, and which involved questions of encroachment, right to the land, title to sue, and possession, appealed to the House of Lords against all the interlocutors of the Courts below. At the hearing in the House, [1904] A. C. 73, one only of these questions was argued by the defendants, and the appeal was allowed:—
Held, by the Appeal Committee, that the defendants were not entitled to an order for the reversal generally of the interlocutors appealed from, but only for the reversal of the interlocutors so far as they related to the question raised in the House. MONTGOMERIE & Co. *v.* WALLACE-JAMES - - - H. L. (Sc.) 214

HUSBAND AND WIFE—*Authority of Wife to pledge Husband's Credit — Goods supplied on Order of Wife — Joint Liability—Presumption arising from Cohabitation—Principal and Agent — Alternative Liability — Election — Judgment signed against one of two Defendants—Order XIV., r.* 5.
The fact that husband and wife live together and that necessaries for the household are supplied on the orders of the wife is not evidence that husband and wife are jointly liable. The presumption that the wife has in such a case authority to pledge the husband's credit may be rebutted by proof that he made her a sufficient allowance, though this arrangement is not known to those who supply the necessaries.
Order XIV., r. 5, does not apply where the right of action can only be in the alternative against one or other of two defendants. In such a case judgment against one of the defendants is conclusive evidence of an election not to proceed against the other.
The decision of the Court of Appeal, [1903] 1 K. B. 64, affirmed. MOREL BROTHERS & Co. *v.* EARL OF WESTMORLAND - H. L. (E.) 11
—— Wife's mortgage of separate property for her husband's benefit void — Onus probandi as to husband's benefit - - 94
See PRIVY COUNCIL APPEALS. 13.

IDENTITY—Trust—Church—Identity—Fundamental doctrines—Limits to power of union - - - - 515
See ECCLESIASTICAL LAW. 4.

IMMORALITY—Clergy discipline.
See Cases under ECCLESIASTICAL LAW.

INCOME TAX—Deductions—Premium on life insurance - - - - 161
See REVENUE. 2.

—— "Income"—British Columbia Assessment Act, 1897 - - - - 144
See PRIVY COUNCIL APPEALS. 3.

INDIA—Laws of - - - - 826
See PRIVY COUNCIL APPEALS. 16.

INJUNCTION—Ancient lights.
See under LIGHT AND AIR.

INSURANCE, LIFE—Income tax—Deductions—Premium on life insurance - 161
See REVENUE. 2.

INSURANCE, MARINE — *Policy — Property of Alien Enemy—Loss before Commencement of War —Seizure by Enemy's Government of Property of its own Subject in anticipation of War—Warranty free of Capture, Seizure, and Detention.*

Gold, the property of a company registered under the laws of the South African Republic, was insured against "arrests, restraints, and detainments of all kings, princes, and people" during transit from the mines to the United Kingdom, subject to a warranty "free of capture, seizure, and detention, whether before or after declaration of war." During transit the gold was taken possession of by the Government of the Republic on its own territory in anticipation of war with Great Britain, and in accordance with the laws of the Republic, and was afterwards appropriated by the Government:—

Held, that there was a "seizure" of the gold within the meaning of the warranty, and that the insurers were not liable on the policy.

The decision of the Court of Appeal, [1902] 2 K. B. 489, affirmed. ROBINSON GOLD MINING COMPANY *v.* ALLIANCE INSURANCE COMPANY H. L. (E.) 359

INTEREST—Money had and received—Interest not recoverable — Costs—Appeal from Sierra Leone - - - 817
See PRIVY COUNCIL APPEALS. 33.

JAMAICA—Laws of - - - - 268
See PRIVY COUNCIL APPEALS. 17.

JUDGMENT—Appeal—Omission in petition for special leave—Costs—Final judgment Yukon Territorial Act - - 429
See PRIVY COUNCIL APPEALS. 7.

—— Appeal, Jurisdiction in—Final decree of High Court of the Republic—Law of the Transvaal - - - - 438
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—— Concurrent judgments—Practice - 73
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—— Discharge of judgment by consent—Compensation—Employers' liability 379
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—— Signed against one of two defendants—Alternative liability—Election - 11
See HUSBAND AND WIFE.

JURISDICTION—Appeal—Final decree of High Court of the Republic—Law of the Transvaal - - - - 438
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JURISDICTION—*continued.*

—— Appeal from assessment officer—Res judicata—Appeal from Ontario - 809
See PRIVY COUNCIL APPEALS. 10.

—— Compromise—Power of Court to bind absent parties - - - - 159
See COMPROMISE.

—— Review of martial law — Convictions by Supreme Court - - - 114
See PRIVY COUNCIL APPEALS. 14.

LAND—Crown grant, Construction of—Confirmation of doubtful title—Laws of New South Wales - - - 273
See PRIVY COUNCIL APPEALS. 21.

——; Resumption of land—Costs of action for compensation — Laws of New South Wales - - - - 259
See PRIVY COUNCIL APPEALS. 19.

LANDLORD AND TENANT — *Lease—Construction—Renewal "at the Costs of the Lessee"—Costs of Reference and Award as to Amount of Fine.*

By a covenant for renewal in a lease for years the lessor covenanted at any time during the term at the request and "at the costs of the lessee," and on payment by him of a fine calculated upon the number of the expired years of the term and the full improved annual value of the premises at the time of the renewal (the value to be determined by the lessor's surveyor or, at the option of the lessee, by two surveyors to be appointed by the lessor and the lessee respectively, and, in case of their differing, by their umpire), to renew the lease for a further term.

The lessee having required a renewal, and the parties being unable to agree as to the amount of the fine, the question of the improved annual value of the premises at the time of the renewal was referred to two referees or their umpire, and the umpire made an award:—

Held, that upon the natural and true construction of the covenant the costs of the reference and award were payable by the lessee as necessary costs of the renewal.

The decision of the Court of Appeal, [1903] 1 K. B. 349, affirmed. FITZSIMMONS *v.* LORD MOSTYN - - - - H. L. (E.) 46

—— Condition to take over sheep at expiration of lease—Forfeiture of lease - 217
See SCOTTISH LAW. 4.

LANDS CLAUSES ACTS—*Compensation—Lands Injuriously Affected—Interest created after Notice to Treat—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 18, 68.

The owner of land received from a railway company notice (under their statutory powers which incorporated the Lands Clauses Consolidation Act, 1845) to treat for part of his land, and the purchase-money was settled by agreement to include compensation for all injurious affection. Between the notice to treat and the agreement the owner granted a lease of some land near to the land purchased. The railway company exercised their powers and injuriously affected the lessee's land:—

Held, that the sum paid to the owner must

LANDS CLAUSES ACTS—*continued.*
be taken to have included compensation for the injury to the lessee's land, and that the lessee was not entitled to compensation under the Lands Clauses Act, 1845.

The decision of the Court of Appeal, [1903] 1 K. B. 652, affirmed. MERCER *v.* LIVERPOOL, ST. HELEN'S AND SOUTH LANCASHIRE RAILWAY COMPANY - - - - **H. L. (E.) 461**

LAPSE—Will—Construction—"Eldest son of my sister"—Lapsed gift - - **268**
See PRIVY COUNCIL APPEALS. 17.

LEASE—Landlord and tenant.
See under LANDLORD AND TENANT.

LIBEL—Corporation, Libel by servant of—Liability of company for malicious libel
See PRIVY COUNCIL APPEALS. 23. **423**

LICENCE—Newfoundland, Laws of—Effect of grant of licence—Trespass on licensee's land before licence granted—Damages
See PRIVY COUNCIL APPEALS. 31. **405**

—— Newfoundland whaling industry - **399**
See PRIVY COUNCIL APPEALS. 32.

LICENSING ACTS—New Zealand Licensing Act—Effect of licensing poll being declared void - - - - - **389**
See PRIVY COUNCIL APPEALS. 29.

LIEN—Shipping—Time charter—Goods within bill of lading not subject to charter lien
See PRIVY COUNCIL APPEALS. 16. **826**

LIFE INSURANCE.
See under INSURANCE, LIFE.

LIGHT AND AIR—*Ancient Lights—Prescription—Substantial Interference—Nuisance—Damage—Measure of Right—Angle of 45 Degrees—Mandatory Injunction—Inquiry as to Damage, Refusal of.*

To constitute an actionable obstruction of ancient lights it is not enough that the light is less than before. There must be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and (in the case of business premises) to prevent the plaintiff from carrying on his business as beneficially as before.

The nature of the right to light and of an infringement was not altered by the Prescription Act (2 & 3 Will. 4, c. 71).

The decision of the Court of Appeal, *Home and Colonial Stores, Limited* v. *Colls*, [1902] 1 Ch. 302, reversed, and the decision of Joyce J. restored.

The decision of the Court of Appeal in *Warren* v. *Brown*, [1902] 1 K. B. 15, overruled. COLLS *v.* HOME AND COLONIAL STORES, LIMITED **H. L. (E.) 179**

LOCAL GOVERNMENT — *Creation of Urban District — Subtraction of Parish from Rural District—Highway Expenses—Loss of Income—Matter requiring Adjustment—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 57, 62—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *ss.* 54, 68.

By order of a county council under s. 57 of the Local Government Act, 1888, a parish which was part of a rural district was separated from that district and made an urban district, and the parish ceased to be rated for the highway expenses of the rural district:—

Held, that the loss of this contribution was not a matter which required to be adjusted between the rural district and the new urban district under s. 62 of the Local Government Act, 1888. That section does not give compensation for any such loss of profit. The word "income" in s. 62 means existing income, and does not include income which may afterwards be derived from making rates.

The decision of the Court of Appeal, *In the Matter of Godstone Rural District Council and Caterham Urban District Council*, [1903] 1 K. B. 554, reversed.

In re Rochdale Union and Haslingden Union, [1899] 1 Q. B. 540, and *Bucks County Council and Herts County Council*, [1899] 1 Q. B. 515, overruled on the above point. CATERHAM URBAN DISTRICT COUNCIL *v.* GODSTONE RURAL DISTRICT COUNCIL - - - **H. L. (E.) 171**

LOCKS—Stanch—Royal Charter, Validity—Implied objection to maintain and repair
See WATER HIGHWAY. **476**

LONDON—Gas rate, Arrears of—Right to recover from incoming tenant - - **331**
See GAS.

MACHINERY — Trade fixtures — Mortgage — Hire-purchase agreement — Rights of mortgagee against owner of machinery—Presumption of law - - **466**
See FIXTURES.

MALICE — Libel by servant of corporation — Liability of company for malicious libel
See PRIVY COUNCIL APPEALS. 23. **423**

MANDATORY INJUNCTION—Ancient lights—Prescription—Measure of right—Angle of 45 degrees - - - **179**
See LIGHT AND AIR.

MARINE INSURANCE.
See under INSURANCE, MARINE.

MARTIAL LAW — Review of—Convictions by Supreme Court—Jurisdiction - **114**
See PRIVY COUNCIL APPEALS. 14.

MASTER AND SERVANT.
See under EMPLOYER AND WORKMAN.

MERCANTILE LAW.
See under SHIPPING.

METROPOLIS.
See under LONDON.

MINE—Canadian Act (53 Vict. c. 4)—Grants thereunder include mines and minerals
See PRIVY COUNCIL APPEALS. 8. **765**

—— Mining regulations—Rights of placer miner as to renewal of his grant - **127**
See PRIVY COUNCIL APPEALS. 4.

—— New Zealand Mining Act, 1898—Compensation - - - - **781**
See PRIVY COUNCIL APPEALS. 27.

—— Water pipe, Right of support for—Minerals under pipe - - - - **64**
See WATER. 2.

MONEY HAD AND RECEIVED—Interest not recoverable—Costs in action to which the Crown is a party—Appeal from Sierra Leone - - - 817
See PRIVY COUNCIL APPEALS. 33.

MORTGAGE—*Clog on Equity of Redemption—Option to purchase Mortgaged Stock — Stock—Limited Company, Mortgage by.*

A mortgagee is not allowed at the time of the loan to enter into a contract for the purchase of the mortgaged property.

A limited company borrowed money upon the security of their debenture stock subject to the lender having the option to purchase the stock at 40 per cent. within twelve months; the loan to become due and payable with interest at thirty days' notice on either side. Within the twelve months and before the company gave notice of their intention to repay the loan, the lender claimed to purchase the stock at the agreed price:—

Held, that the option was void, and that the company was entitled to redeem the loan on payment of principal, interest, and costs.

The decision of the Court of Appeal, *Jarrah Timber and Wood Paving Corporation, Ld.* v. *Samuel*, [1903] 2 Ch. 1, affirmed. SAMUEL *v.* JARRAH TIMBER AND WOOD PAVING CORPORATION, LIMITED - - - H. L. (E.) 323

—— Company — Assignment of present and future book debts — Registration of mortgage - - - - 355
See COMPANY. 2.

—— Estate duty—Principal value—Tenant for life indemnified against mortgage debt
See REVENUE. 1. 316

—— Trade fixtures—Hire-purchase agreement—Rights of mortgagee against owner of machinery—Presumption of law - 466
See FIXTURES.

—— Wife's mortgage of separate property for her husband's benefit void—Onus probandi as to husband's benefit - 94
See PRIVY COUNCIL APPEALS. 13.

MUSSEL FISHINGS—Crown rights - 364
See SCOTTISH LAW. 3.

NATAL—Laws of - - - 120, 250
See PRIVY COUNCIL APPEALS. 18, 19.

NEGLIGENCE—Charterparty—Unseaworthiness at starting — Personal negligence of owner in lading - - - 250
See PRIVY COUNCIL APPEALS. 19.

NEW SOUTH WALES—Laws of 137, 259, 273, 382, 423, 795
See PRIVY COUNCIL APPEALS. 20—25.

NEW ZEALAND—Laws of - 149, 389, 442, 773, 781
See PRIVY COUNCIL APPEALS. 26—30.

NEWFOUNDLAND—Laws of - - 399, 405
See PRIVY COUNCIL APPEALS. 31, 32.

NOTICE—Lands injuriously affected—Interest created after notice to treat - 461
See LANDS CLAUSES ACTS.

ONTARIO—Laws of - - - 103, 809
See PRIVY COUNCIL APPEALS. 10, 11.

ONUS PROBANDI—As to husband's benefit—Wife's mortgage of separate property for her husband's benefit void - 94
See PRIVY COUNCIL APPEALS. 13.

PARTIES—Power of Court to bind absent parties—Extent of jurisdiction - - 159
See COMPROMISE.

PATENT—Appeal, Jurisdiction in—Final decree of High Court of the Republic—Law of the Transvaal - - - 438
See PRIVY COUNCIL APPEALS. 1.

PLEDGE—Authority of wife to pledge husband's credit—Presumption arising from cohabitation - - - - 11
See HUSBAND AND WIFE.

POLICY.
See under INSURANCE, MARINE.

POOR LAW—*Parish of Settlement—Addition to Parish—Pauper—Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61)—*Poor Law Act*, 1879 (42 & 43 *Vict. c.* 54).

Parish A., to the area of which an addition has been made out of parish B., by an order under the Divided Parishes and Poor Law Amendment Act, 1876, does not lose its identity, and the settlement of a pauper in parish A. is not affected.

The decision of the Court of Appeal, [1902] 1 K. B. 562, affirmed.

Query, whether *Reg.* v. *Tipton*, (1842) 3 Q. B. 215; 61 R. R. 203, and the cases following it were rightly decided. WEST HAM UNION *v.* LONDON COUNTY COUNCIL - H. L. (E.) 40

POWER OF APPOINTMENT — Probate duty claimed on property subject to special
See PRIVY COUNCIL APPEALS. 24. 137

POWERS — Trust — Church — Identity—Fundamental doctrines—Limits to power of union - - - - 515
See ECCLESIASTICAL LAW. 4.

PRACTICE — Appeal — Final decree of High Court of the Republic—Jurisdiction in appeal—Law of the Transvaal - 438
See PRIVY COUNCIL APPEALS. 1.

—— Appeal — Final judgment — Yukon Territorial Act — Omission in petition for special leave—Costs - - 429
See PRIVY COUNCIL APPEALS. 7.

—— Appeal—Jurisdiction to appeal from assessment officer—Appeal from Ontario 809
See PRIVY COUNCIL APPEALS. 10.

—— Appeal—Petition for leave to—Enlargement of time—Clergy discipline - 805
See ECCLESIASTICAL LAW. 3.

—— Appeal—Petition for special leave by appellants to Supreme Court—Appeal from Canada - - - - 806
See PRIVY COUNCIL APPEALS. 5.

—— Appeal—Special leave—Abstract point of law - - - - - 412
See PRIVY COUNCIL APPEALS. 15.

PRACTICE—*continued.*

—— Appeal—Special leave—Decree of Supreme Court of Canada—Petition by appellant to Supreme Court - - - 453
See PRIVY COUNCIL APPEALS. 6.

—— Appeal—Special leave to appeal—Decree of Supreme Court of Canada—Petition by appellant to Supreme Court - 453
See PRIVY COUNCIL APPEALS. 6.

—— Appeal—Special leave to appeal—High Court of Australia - - - 776
See PRIVY COUNCIL APPEALS. 2.

—— Appeal in formâ pauperis, Special leave to—Certificate of counsel - - - 149
See PRIVY COUNCIL APPEALS. 30.

—— Compromise—Power of Court to bind absent person—Extent of jurisdiction - 159
See COMPROMISE.

—— Costs in action to which the Crown is a party—Appeal from Sierra Leone 817
See PRIVY COUNCIL APPEALS. 33.

—— Discharge of judgment by consent—Compensation—Employers' liability - 379
See HOUSE OF LORDS. 1.

—— House of Lords—Reversal—Point not argued - - - - - 214
See HOUSE OF LORDS. 2.

PREMIUM — Income tax — Deductions — Premium on life insurance - - 161
See REVENUE. 2.

PRESCRIPTION — Ancient lights — Substantial interference—Measure of right—Angle of 45 degrees - - - 179
See LIGHT AND AIR.

PRESUMPTION—Authority of wife to pledge husband's credit—Presumption arising from cohabitation—Election - 11
See HUSBAND AND WIFE.

—— Trade fixtures—Mortgage—Hire-purchase agreement—Rights of mortgagee against owner of machinery—Presumption of law - - - - - 466
See FIXTURES.

PRINCIPAL AND AGENT—Alternative liability—Election—Judgment signed against one of two defendants - - 11
See HUSBAND AND WIFE.

PRIVATE STREETS.
See under STREETS.

PRIVY COUNCIL APPEALS—AFRICA—*Transvaal—Practice—Appeal—Law of the Transvaal—Proclamation No.* 14 *of* 1902, *s.* 16—*Final Decree of High Court of the Republic—Jurisdiction in Appeal—Transvaal Patent Act, No.* 6 *of* 1887, *ss.* 29–31—*Construction.*

The Supreme Court of the Transvaal, constituted by the Transvaal Proclamation No. 14 of 1902, has no jurisdiction to entertain an appeal from a decision of the High Court of the Transvaal Republic which before the war was final; for s. 16 of the proclamation gives no right of appeal where none existed before:—

Held, also, that the High Court had power under the Transvaal Patent Act, No. 6 of 1887, ss. 29–31, to cancel a patent in an action to which the Attorney-General was not a party. AFRICAN GOLD RECOVERY COMPANY *v.* HAY - P. C. 438

2. —— **AUSTRALIA**—*Practice—Special leave to Appeal—High Court of Australia.*

An application for special leave to appeal from the High Court of Australia will be treated in the same manner as an application for special leave to appeal from the Supreme Court of Canada. It will not be entertained save where the case is of gravity involving matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character.

Prince v. *Gagnon*, (1882) 8 App. Cas. 103, followed.

Where a limited company, acting upon a deed of transfer executed through a power of attorney signed by the plaintiff whilst of unsound mind, transferred shares standing in their register in his name, their Lordships, seeing no reason to doubt the correctness of the High Court's judgment to the effect that the power was void, and the deed of transfer a nullity, declined to advise that special leave be given. DAILY TELEGRAPH NEWSPAPER COMPANY *v.* MCLAUGHLIN P. C. 776

3. —— **BRITISH COLUMBIA**—*Income tax—"Income"—British Columbia Assessment Act*, 1897—*Construction.*

Held, that, on the true construction of the British Columbia Assessment Act (R. S. c. 179), the word "income" includes all gains and profits derived from personal exertions, whether such gains and profits are fixed or fluctuating, certain or precarious, whatever may be the principle or basis of calculation. ATTORNEY-GENERAL OF BRITISH COLUMBIA *v.* OSTRUM - P. C. 144

4. —— **CANADA**—*Mines—Dominion Lands Act* (*Revised Statutes of Canada, c.* 54), *s.* 47—*Mining Regulations of* 1889, *s.* 17—*Rights of Placer Miner as to Renewal of his Grant—Construction.*

Sect. 17 of the Mining Regulations passed under the Dominion Lands Act (Revised Statutes of Canada, c. 54) does not on its true construction extend to the holder of a grant for placer mining the same privileges as to a renewal of his grant which are accorded to the holder of a quartz mining grant.

The placer miner on renewal (to which he has no absolute, but only a preferential, right) holds under an annual grant in substitution for, but not in continuation of, his original grant. And the renewed grant is subject to all such regulations as may be in force at the date when it comes into operation, whether or not it was made during the currency of an existing draft:—

Held, that the Governor in Council has power to make regulations requiring the placer miner to pay a percentage on the proceeds realized from the grant. Such an imposition, called a royalty, is not a tax, but is a reservation which the owner in fee is entitled to make out of his grant. CHAPPELLE *v.* THE KING. CARMACK *v.* THE KING. TWEED *v.* THE KING - - - P. C. 127

5. —— *Practice—Appeal—Petition for Special Leave by Appellants to Supreme Court.*

Petition for special leave to appeal from the

PRIVY COUNCIL APPEALS—CANADA—*contd.*

Supreme Court of Canada dismissed where the petitioners were appellants to that Court and no important question of law was raised. WILLIAM EWING & Co. *v.* DOMINION BANK - **P. C. 806**

6. —— *Practice—Appeal—Special Leave to Appeal—Decree of Supreme Court of Canada—Petition by Appellant to Supreme Court.*

Special leave to appeal from a decree of the Supreme Court of Canada will not be granted to a petitioner who has elected to appeal to that Court and not to His Majesty direct, unless a question of law is raised of sufficient importance to justify it.

Ex parte Clergue, [1903] A. C. 521, followed. CANADIAN PACIFIC RAILWAY COMPANY *v.* BLAIN **P. C. 453**

7. —— *Practice — Final Judgment — Yukon Territorial Act*, 1899, *s.* 8—*Omission in Petition for Special Leave—Costs.*

In an action by executors against the appellant to recover certain sums of money due to their estate, the judge of the Territorial Court, at the request of the plaintiffs, selected one of the items, and adjudicated on the evidence taken that the action in respect thereof be dismissed :—

Held, that this was, within the meaning of the Yukon Territorial Act, 1899, s. 8, a final judgment in respect thereof, notwithstanding that the remaining items in suit were referred and the costs were reserved. No appeal therefrom to the British Columbia Court lay after the expiration of twenty days.

Special leave having been granted from a decree of the Supreme Court of Canada on a petition stating that the construction of the said statute was a matter of general public importance, without stating that it had been repealed :—

Held, that as the omission was immaterial and bonâ fide the appellant should not be deprived of his costs. MCDONALD *v.* BELCHER **P. C. 429**

8. —— *Railway Company—Grants thereunder include Mines and Minerals—Canadian Act* (53 *Vict. c.* 4)—*Orders in Council thereunder—Construction.*

Held, that the appellant railway company, being entitled under Canadian Act 53 Vict. c. 4 and an Order in Council made in pursuance thereof to grants of Dominion lands as a subsidy in aid of the construction of their railway, were entitled to them without any reservation by the Crown of mines and minerals except gold and silver. The Dominion Lands Act, 1886, and the Regulations of 1889 thereunder, which prescribe a reservation to that effect, do not apply. They relate only to the sale of Dominion lands and to the settlement, use, and occupation thereof. The grants in question were not by way of sale. CALGARY AND EDMONTON RAILWAY COMPANY *v.* THE KING - - - - **P. C. 765**

9. —— *Swamp Lands—Crown Lands—Canadian Act* (48 *&* 49 *Vict. c.* 50), *s.* 1—*Construction—Transfer of Proprietary Right—Vesting at a Future Date.*

By s. 1 of the Canadian Act (48 & 49 Vict. c. 50), subsequently re-enacted by Revised Statutes of Canada, c. 47, s. 4, it was provided that all Crown lands which may be shewn to the satisfaction of the Dominion Government to be swamp lands shall be transferred to the province and enure wholly to its benefit and uses :—

Held, that by its true construction the section did not operate an immediate transfer to the province of any swamp lands or of the profits arising therefrom, but only from the date of the Order in Council, made after survey and selection as prescribed by the Act directing that the selected lands be vested in the province. Down to that date the profits resulting from the transferred lands belonged to the Dominion. ATTORNEY-GENERAL FOR MANITOBA *v.* ATTORNEY-GENERAL FOR CANADA - - - - **P. C. 799**

10. —— *Ontario — Railway Company — Electric Cars not Real Estate—Res Judicata—Jurisdiction in Appeal from Assessment Officer—Revised Statutes of Ontario, c.* 224, *s.* 39, *sub-s.* 2 *—Personal Estate exempt from Assessment.*

Under c. 224 of the Revised Statutes of Ontario, 1897, the personal property of the appellant railway company is exempt from assessment (s. 39, sub-s. 2), while its real estate (s. 2, sub-s. 9) includes everything affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty :—

Held, that its electric cars are personal estate, inasmuch as they are not part of the railway and are not fixed in any sense to anything which is real estate :—

Held, also, that a decision between the same parties by the Court of Revision, established under s. 62 of the above Act, and of the Courts in appeal therefrom, to the effect that the electric cars were assessable, is not res judicata. By s. 68 the jurisdiction of those Courts is confined to the amount of assessment, and does not extend to validate an assessment unauthorized by the statute. TORONTO RAILWAY COMPANY *v.* CORPORATION OF THE CITY OF TORONTO - **P. C. 809**

11. —— *Ontario—Trade-mark—"Caledonia Waters"—No exclusive Right to the Trade Word of Local Source.*

Where the mineral waters of the appellant derived from various Caledonia Springs, so called from being in a township of that name, acquired in the market the name of "Caledonia Water"; and the respondents having discovered other springs in the same township sold their goods as "from new springs at Caledonia" :—

Held, in an action for an injunction, that the appellants had not, in the circumstances, a right to the exclusive use of the word "Caledonia." The respondents were entitled to indicate the local source of their waters, and had sufficiently distinguished their goods from those of the appellants. GRAND HOTEL COMPANY OF CALEDONIA SPRINGS, LIMITED *v.* WILSON - **P. C. 103**

12. —— *Quebec—Guarantee of Debentures by a Municipality—Invalidity of By-law—Quebec Act* (60 *Vict. c.* 78), *ss.* 7 (*c*) *and* 27—*Construction—Approval by Ratepayers and Lieutenant-Governor.*

A by-law enacted under the Towns Corporation Act (c. 1, tit. 11, Revised Statutes of Quebec, 1888) by the respondent corporation guaranteed debentures to a specified amount to be issued by a company with which the corporation contracted for the execution of a public work within the

PRIVY COUNCIL APPEALS—CANADA—*contd.*
municipality; but the same had not been submitted to the municipal electors for their approval or to the Lieutenant-Governor for his authority :—

Held, in a suit by debenture-holders against the corporation, that the guarantee was in consequence ultra vires:

Held, also, with regard to the special Act (60 Vict. c. 78) under which the company was incorporated, that the above contract involved a financial obligation on the part of the corporation within the meaning of s. 7 (*c*). Both under that section and s. 27, which should be read together, a by-law must be approved by a majority of the whole body of ratepayers. HANSON *v.* CORPORATION OF THE VILLAGE OF GRAND MÈRE **P. C. 789**

13. —— *Quebec—Husband and Wife—Wife's Mortgage of Separate Property for her Husband's Benefit void — Onus probandi as to Husband's Benefit—Civil Code of Lower Canada, art.* 1301—*Construction.*

By the true construction of art. 1301 of the Civil Code of Lower Canada a wife's mortgage of her separate property is void both as to the debt contracted and as to the disposition if it is in any way for her husband's purposes. Ignorance on the part of the lender that the money was borrowed for the husband's purposes is of no avail, and the burden is on him to prove that it was not so borrowed. TRUST AND LOAN COMPANY OF CANADA *v.* GAUTHIER - - - **P. C. 94**

14. —— **CAPE OF GOOD HOPE**—*Martial Law Regulations—Review of Martial Law—Convictions by Supreme Court—Jurisdiction.*

The Supreme Court of the Cape of Good Hope has no jurisdiction to review judgments of Martial Law Courts.

Where a deputy administrator of martial law was also a resident magistrate, and by mistake used in proceedings relating to acts contravening martial law regulations the printed forms of his Magistrate's Court with headings appropriate thereto :—

Held, that his convictions could not on that account be quashed as irregular; it appearing that they were in fact made in the administration of martial law. ATTORNEY-GENERAL FOR THE CAPE OF GOOD HOPE *v.* VAN REENEN. ATTORNEY-GENERAL FOR THE CAPE OF GOOD HOPE *v.* SMIT **P. C. 114**

15. —— *Practice—Appeal—Special Leave—Abstract Point of Law.*

Special leave will not be granted to appeal from a judgment which is not impeached, merely with a view to have an abstract point of law, not arising in the case, decided by their Lordships. THE KING *v.* LOUW. *Ex parte* ATTORNEY-GENERAL FOR CAPE OF GOOD HOPE - - **P. C. 412**

16. —— **INDIA**—*Bombay—Shipping, Law of —Time Charter—Sub-charter—Bills of Lading—Goods within Bill of Lading not subject to Charter Lien—Construction of Contract.*

Under a time charter with power to sublet the shipowners retained legal possession of the ship through the captain appointed and paid by themselves, who was to be the agent in several respects for the charterers, and in particular to sign bills of lading at any rates of freight that

PRIVY COUNCIL APPEALS—INDIA—*contd.*
they might direct "without prejudice to this charter," and they also were entitled to a lien upon all cargoes for freight or charter money due under the charter :—

Held, that bills of lading granted by the captain to the respondent, a sub-charterer from the charterers with notice of the time charter, were not mere receipts for goods, but contracts which bound the shipowners, and that the respondent, having paid his bill of lading freight, was entitled to his goods free of lien for the time charterer's dues.

Colvin v. *Newberry*, (1832) 1 Cl. & F. 283; 33 R. R. 437, distinguished.

Held, further, that the words "without prejudice to this charter" mean that the time charter remains unaltered as between the owners and the charterers, notwithstanding the bills of lading. They do not limit the power of the captain to issue bills of lading at different rates of freight, or entitle the shipowners to a lien on the goods comprised therein for freight payable under the time charter. TURNER *v.* HAJI GOOLAM MAHOMEDAN AZAM - - - **P. C. 826**

17. —— **JAMAICA**—*Will—"Eldest Son of my Sister"—Lapsed Gift—Construction of Will.*

A gift "to the eldest son of my sister and his heirs for ever" operates in favour of the elder of her two sons living at the date of the will, though he predeceased the testator, in the absence of any contrary intention appearing in the context. As the gift lapsed on the death of the donee, there was an intestacy in favour of the heir-at-law. AMYOT *v.* DWARRIS - - - **P. C. 268**

18. —— **NATAL**—*Company — Contract for Company before Incorporation—Rights of Company.*

A company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence. In order to do so a new contract must be made with it after its incorporation on the terms of the old one.

Kelner v. *Baxter*, (1866) L. R. 2 C. P. 174, approved. NATAL LAND AND COLONIZATION COMPANY *v.* PAULINE COLLIERY AND DEVELOPMENT SYNDICATE - - - **P. C. 120**

19. —— *Shipping — Charterparty — Unseaworthiness at Starting — Personal Negligence of Owner in Lading.*

Unless the conditions of a charterparty relieve the owner as distinct from his servants and agents from the consequences of personal negligence, he is liable if his ship, in other respects seaworthy, is rendered unseaworthy in being so laden under his orders as to become topheavy at starting, with the result that her deck cargo was partly jettisoned and partly swept overboard in a gale which otherwise could have been weathered in safety. MASTER AND OWNERS OF SS. "CITY OF LINCOLN" *v.* SMITH - **P. C. 250**

20. —— **NEW SOUTH WALES**—*Costs of Action, Arbitration, and Award—Law of New South Wales—Public Works Act*, 1900, *s.* 116, *sub-s.* 2 (*b*).

Where the respondents tendered 2000*l.* as compensation due under the New South Wales

PRIVY COUNCIL APPEALS — NEW SOUTH WALES—*continued.*

Public Works Act, 1900, and the appellants were awarded 18,450*l.* by the arbitrators, and recovered 17,609*l.* in an action brought:—

Held, that by the unambiguous language of s. 116, sub-s. 2 (*b*), the appellants must bear all the costs of the action, arbitration, and award, notwithstanding the inadequate tender made by the respondents. PACIFIC CO-OPERATIVE STEAM COAL COMPANY, LIMITED *v.* RAILWAY COMMISSIONERS OF NEW SOUTH WALES - P. C. 795

21. —— *Crown Grant, Construction of—Confirmation of doubtful Title—Effect of Reservation of Land in Crown Grant—Claim by Crown against registered Title.*

In 1826 the Crown granted a charter incorporating certain persons as trustees of clergy and school lands in the Colony, whereby it was declared that "glebe lands" (admitted to include the land now in question) should on the death or resignation of the then incumbents become vested in the corporation.

In 1828 the corporation sold (inter alia) the land in question by auction to D., purporting to act under the charter. The incumbent had previously agreed to resign, but there was no evidence of formal resignation. A confirming grant from the Crown, which was usual in practice, was applied for but not obtained before the sale.

In 1829 the Crown granted certain glebe lands to the corporation, reserving all coast land within 100 feet of high-water mark. The land in question would have passed by the general description, if vested in the Crown, but was within the terms of the reservation. D. was not a party to this grant.

In 1830 the corporation conveyed to D. the land he had purchased in 1828, reciting the grant of 1829, and in that recital referring to "the reservation and conditions" therein contained, but not expressing any reservation or exception in the operative part, and taking a mortgage for part of the purchase-money.

In 1833 the corporation was dissolved, and its property reverted to the Crown under the charter of 1826.

In 1840 D. paid off his mortgage to the Crown and the Crown granted and confirmed to D. in fee the premises comprised in the deed of 1830. There was no mention of any exception, and the stated acreage would have been short without the coast strip of 100 feet.

Later discussion arose between the Crown and the respondents, who claimed by purchase through D. The respondents were registered as owners in 1887. In 1900 the Crown claimed the coast strip, as having been reserved in 1829 and not included in the grant of 1840:—

Held, affirming the decision of the Supreme Court, that the corporation had no title to grant the land in question, but that the conditions of sale of 1828 might have misled the purchaser, and the conveyance of 1830 was ambiguous, and that the Crown grant of 1840 was intended to remove the doubt, and did confirm to D. the land down to the water's edge.

Quære, whether it was open to the Crown to

A. C. 1904.

PRIVY COUNCIL APPEALS — NEW SOUTH WALES—*continued.*

dispute the registered title. ATTORNEY-GENERAL FOR NEW SOUTH WALES *v.* DICKSON P. C. 273

22. —— *Land, Resumption of—Costs of Action for Compensation — Irregular Amendment of Notified Valuation—New South Wales Public Works Act* (26 *of* 1900), *ss.* 96, 99.

Under s. 96 of the New South Wales Public Works Act the Minister notified in the scheduled form that 9460*l.* was the valuation of land resumed under statutory authority, and subsequently by letter not in scheduled form increased the valuation to 9900*l.*:—

Held, that this letter was a sufficient though irregular amendment of the previous formal notification, and that, the Court having fixed the compensation to be paid at 9900*l.*, the owner must pay the costs as directed by s. 99. MINISTER OF PUBLIC WORKS *v.* HART - - P. C. 259

23. —— *Libel by Servant of Corporation—Liability of Company for Malicious Libel.*

A corporation cannot be held to be incapable of malice so as to be relieved of liability for malicious libel when published by its servant acting in the course of his employment.

Although the servant may have had no actual authority, express or implied, to write the libel complained of, containing statements against the plaintiff which he knew to be untrue, if he did so in the course of an employment which is authorized, the corporation is liable.

Barwick v. *English Joint Stock Bank*, (1867) L. R. 2 Ex. 259, approved. CITIZENS' LIFE ASSURANCE COMPANY *v.* BROWN - P. C. 423

24. —— *Probate Duty—Duty claimed on Property subject to special Power of Appointment by Deceased—New South Wales Stamp Duties Act*, 1898, *s.* 49, *sub-s.* 2 *A* (*a*)—*Construction.*

Mere general language in a probate duty statute applicable to the property of deceased persons and to property subject to their general power of appointment does not extend to property subject to a special power to appoint amongst a limited class. The intention to include the latter must be clearly expressed and accompanied by apt provisions:—

Held, on a consideration of all the provisions of the New South Wales Stamp Duties Act, 1898, that s. 49, sub-s. 2 A (*a*), does not on its true construction apply to property over which a deceased person has only a special as distinguished from a general power of appointment by will. COMMISSIONER OF STAMP DUTIES *v.* STEPHEN P. C. 137

25. —— *Wharves—Right to levy Wharfage Rates on all Wharves vested in the Commissioners—Sydney Harbour Trust Act, s.* 68—*Construction.*

Held, that s. 68 of the Sydney Harbour Trust Act authorizes the levy of wharfage rates on all wharves vested in the Commissioners, whether private, or public, or private sufferance wharves:

Held, also, that the appellants had no interest in the wharves in suit which under s. 27 would preclude the levy of rates. Their Crown leases thereof had expired, and after the passing of the Trust Act could not be renewed. A right as rent-paying tenants after the expiration of a

PRIVY COUNCIL APPEALS — NEW SOUTH WALES—*continued.*

Crown lease to occupy the wharves as their private wharves is not an interest within s. 27 of the Act, and would be ineffectual to exempt the appellants from liability. LUKEY *v.* SYDNEY HARBOUR TRUST COMMISSIONERS - P. C. 382

26. —— NEW ZEALAND—*Bridges—"Adjacent"—New Zealand Municipal Corporations Act*, 1900, *s.* 219—*Construction.*

Sect. 219 of the New Zealand Municipal Corporations Act, 1900, empowers the construction of bridges by municipal councils, and provides that in certain circumstances the local authority of an adjacent district should contribute to the cost:—

Held, that the word "adjacent" is not a word of precise and uniform meaning, and the degree of proximity denoted is a question of circumstances. The Court below having decided that the appellant city was adjacent to the respondent borough although there was a distance of over six miles between their boundaries and three other local divisions intervened, its discretion was not interfered with. MAYOR OF WELLINGTON *v.* MAYOR OF LOWER HUTT - - P. C. 773

27. —— *Compensation—New Zealand Mining Act*, 1898, *ss.* 232, 233—*Public Works Act*, 1894, *s.* 44—*Amount must be settled by agreement or judicial decision—Summary Procedure unauthorized.*

The incorporation by s. 232 of the New Zealand Mining Act, 1898, of the machinery of the Public Works Act, 1894, for ascertainment and settlement of compensation is expressly made subject to all the provisions of the incorporating Act. Where the appellant claimed compensation for lands injuriously affected by the authorized pollution of a river, and obtained judgment under the Public Works Act, s. 44, for the same, as not having been disputed by the Minister within the time prescribed thereby:—

Held, that the judgment must be set aside, because the claim, not having been settled by agreement, should have been adjudicated upon as provided by s. 233 of the Mining Act, which precludes the summary procedure of s. 44 of the earlier Act. HESLOP *v.* MINISTER OF MINES FOR NEW ZEALAND - - - - P. C. 781

28. —— *Contract to execute Works—Wrongful Seizure of Works by Defendants—Plaintiff entitled to determine the Contract.*

Where the appellants, having guaranteed the due performance of a contract made with a municipal corporation for the execution of works on its land, agreed on the contractor's default with the respondent to complete the execution of the works on the terms of the original contract, and in effect delegated the supervision of the contract and all incidental arrangements to the corporation, and the corporation, according to the findings of the jury, improperly prevented the respondent from proceeding with the stipulated expedition and wrongfully seized the works and extruded the respondent:—

Held, that the appellants, having by their conduct constituted the corporation their agents and the delay being attributable to their acts, could not justify the seizure and re-entry; and

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that the respondent was entitled to treat the contract as at an end and sue on quantum meruit. LODDER *v.* SLOWEY - - - P. C. 442

29. —— *Licensing Acts—Effect of Licensing Poll being declared void—New Zealand Interpretation Act*, *s.* 5, *sub-s.* 7—*New Zealand Licensing Act*, 1895, *s.* 3—*Construction.*

Sect. 5, sub-s. 7, of the New Zealand Interpretation Act (1888, No. 15) provides that Acts should be liberally construed so as to ensure the attainment of the object of the Act according to its true intent, meaning, and spirit.

According to the literal meaning of s. 3 of the New Zealand Licensing Act of 1895, the appellant's publican's licence for an hotel in the Newtown district could not be renewed; for the last licensing poll of the electors having been declared void, a determination by the electors as required by that section had not been made

But *held* that as, having regard to s. 2, sub-s. 3, and s. 8, sub-s. 4, of the same Act, and to s. 21 of the Licensing Act of 1893, the plain intention of the Legislature appeared to be that existing licences should continue until a determination had been made by the electors, effect must be given thereto; and accordingly a mandamus was directed to the respondents, the licensing committee of the said district, to hear and determine the appellant's application for a renewal. SMITH *v.* MCARTHUR - - - P. C. 389

30. —— *Practice—Special Leave to Appeal in Formâ Pauperis—Certificate of Counsel.*

Petition for special leave to appeal in formâ pauperis refused on the merits. It was explained that in accordance with English practice, so far as the same was applicable, the absence of a certificate signed by independent counsel, that is who had not appeared in the Court below, was not in itself a sufficient ground for a local Court of Appeal refusing leave to appeal in similar form from the Court of first instance. MITCHELL *v.* NEW ZEALAND LOAN AND MERCANTILE COMPANY. *Ex parte* MITCHELL - - P. C. 149

31. —— NEWFOUNDLAND — *Trespass on Licensee's Land before Licence granted—Damages—Consolidated Statutes of Newfoundland (2nd Series)*, *c.* 13, *s.* 51—*Effect of Grant of Licence.*

A licence granted by the Government to the respondent in pursuance of s. 51 of c. 13 of the Consolidated Statutes of Newfoundland (2nd Series), giving an exclusive right of occupation of land, though subject to reservations or to a restriction as to its user, is in law a demise of land.

Prior to its grant the appellants, expecting and believing that they would obtain the licence, commenced cutting timber on the land comprised therein, and continued to do so until three days after its grant, notwithstanding a formal notice from the respondent; and after that date they removed the logs so cut:—

Held, that the appellants were wrong-doers, and that the respondent as lessee had lawful possession of the logs so cut, which established a good title against the appellants with a right to consequent relief—that is, to the value of the logs removed without deducting the expenses of

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the said wrongful acts except so far as agreed. GLENWOOD LUMBER COMPANY *v.* PHILLIPS
P. C. 405

32. —— *Whaling Industry — Licences—Newfoundland Whaling Industry Act*, 1902—*Construction.*

Licences under the Newfoundland Whaling Industry Act, 1902 (2 Edw. 7, c. 11), can only be granted by the Governor in Council in the manner prescribed by the Act.

A receipt for a licence fee, not granted by the Governor and not containing words appropriate to the grant of a licence, is not a licence, and cannot operate as such. Nor can it be evidence of a contract to grant a licence in terms of the application. NEWFOUNDLAND STEAM WHALING COMPANY *v.* GOVERNMENT OF NEWFOUNDLAND
P. C. 399

33. —— **SIERRA LEONE**—*Money had and received—Interest not recoverable—Costs in action to which the Crown is a party—Practice.*

Although interest is recoverable both at law and in equity on money obtained by fraud and retained by fraud, yet in a case where the Crown as plaintiff intentionally put aside all question of fraud, and accepted repayment as money paid by mistake, no evidence being offered in the civil suit of fraudulent pretences which had been proved against the defendant in a Criminal Court:—

Held, that interest was not recoverable; and that the order appealed from, granting interest on the ground of special damage, must be reversed without costs.

In future the Board will adhere to the practice of the House of Lords, and the rule as to costs in cases between the Crown and a subject will be that the Crown neither pays nor receives costs unless the case is governed by some local statute, or there are exceptional circumstances justifying a departure from the ordinary rule. JOHNSON *v.* THE KING - - - P. C. 817

34. —— **TRINIDAD AND TOBAGO**—*Deed of Concession—Construction of Covenant—Lands in possession of the Crown—Law of Trinidad and Tobago.*

A restrictive covenant by the Crown contained in its deed of concession affected certain lands situate within three miles of the subject of concession "which now are, or at any time during the said term or terms shall come into, the possession of Her Majesty."

In an action by the appellants for injunction and damages in respect of a breach of the said covenant by the Government:—

Held, that on its true construction it related only to lands in the actual possession, and did not include lands which were merely subject to the control, of the Crown, irrespective of the Crown having done anything with respect to the use or occupation of them. NEW TRINIDAD LAKE ASPHALT COMPANY *v.* ATTORNEY-GENERAL
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REVENUE—*Estate Duty—Property passing on Death — Principal Value—Mortgage in fee by Tenant for Life and Remainderman—Tenant for Life indemnified against Mortgage Debt—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 7.

A tenant for life of realty joined with the remainderman in mortgaging the realty. The loan was made to the remainderman only, and he alone covenanted for the repayment. He also covenanted to indemnify the tenant for life against the mortgage debt and interest, and assigned another property to secure the indemnity:—

Held, that, in estimating the principal value of the realty for estate duty payable by the remainderman on the death of the tenant for life, no deduction could be made on account of the mortgage debt.

The decision of the Court of Appeal, [1903] 1 K. B. 483, reversed, and the decision of Phillimore J., [1902] 1 K. B. 429, restored. ATTORNEY-GENERAL *v.* LORD MONTAGU - **H. L. (E.) 316**

2. —— *Income Tax—Deductions—Premium on Life Insurance—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 54.

Where under a life insurance policy the insurer advances the annual premium to the assured as a loan on the security of the policy, and gives him receipts for the premium as "paid," the assured is not entitled to deduct the amount of the premium from his profits and gains under Sched. D. of the Income Tax Act; for it is not in fact "paid by him" within the meaning of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 54.

So *held* by the Earl of Halsbury L.C. and Lords Macnaghten, Davey, Robertson, and Lindley. Lord James of Hereford dissenting.

The decision of the Court of Appeal, [1903] 1 K. B. 514, affirmed. HUNTER *v.* THE KING **H. (L. E.) 161**

3. —— *Stamp Duty — Property purchased under Statutory Power — Conveyance — Duty on Transfer of Personal Property—Finance Act*, 1895 (58 & 59 *Vict. c.* 16), *s.* 12.

Sect. 12 of the Finance Act, 1895, applies to personal as well as real property, so that a person purchasing land and goods under statutory authority must produce to the Inland Revenue a conveyance of the goods as well as of the land, and pay ad valorem stamp duty upon the whole of the property.

The decision of the Court of Appeal, *Attorney-General* v. *Eastbourne Corporation*, [1902] 1 K. B. 403, affirmed. EASTBOURNE CORPORATION *v.* ATTORNEY-GENERAL - **H. L. (E.) 155**

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SALE OF GOODS—*Appropriation of Goods to Contract—Bankruptcy of Manufacturer—Right of Trustee to Articles in course of Manufacture—Ship — Mercantile Law Amendment (Scotland) Act*, 1856 (19 & 20 *Vict. c.* 60), *s.* 1—*Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *ss.* 16, 17, 18.

A firm of shipbuilders contracted to build a ship for a firm of shipowners, to be classed 100 A1 at Lloyd's and to be constructed under the superintendence of the shipowners. The contract contained this clause: "(4.) The vessel as she is constructed, and all her engines, boilers, and machinery, and all materials from time to time intended for her or them, whether in the building-yard, workshop, river, or elsewhere, shall immediately as the same proceeds become the property of the purchasers, and shall not be within the ownership, control, or disposition of the builders, but the builders shall at all times have a lien thereon for their unpaid purchase-money." Before the ship was completed the shipbuilders became bankrupt. At the date of the bankruptcy there were lying at railway stations a quantity of iron and steel plates at the orders of the shipbuilders. These plates were claimed by the trustee in the shipbuilders' sequestration, and also by the shipowners. The plates had been passed by Lloyd's surveyor at the makers' works, and they were each numbered by the makers with the number of the vessel and with marks shewing the position which each plate was to occupy in the vessel:—

Held, reversing the decision of the First Division of the Court of Session, that the contract

SALE OF GOODS—*continued.*

was for the purpose of a "complete ship," and the materials in question could not be regarded as appropriated to the contract or sold under the Sale of Goods Act.

Seath & Co. v. *Moore*, (1886) 11 App. Cas, 350, followed. REID *v.* MACBETH & GRAY

H. L. (Sc.) 223

SCOTTISH LAW—*Burgh Property—Immemorial use by Inhabitants of Ground for Recreation—Encroachment—Concurrent Judgments.*

There is no law or settled practice of this House to prevent it from differing even from two concurrent judgments of fact, and this House cannot decline the duty of formally expressing its own judgment.

Observations of Lord Herschell L.C. in *Owners of the "P. Caland" and Freight* v. *Glamorgan Steamship Co.*, [1893] A. C. 207, 215, and in *McIntyre Brothers* v. *McGavin*, [1893] A. C. 268, 275, explained.

In Scottish law at least forty years' use by the inhabitants must be proved in order to establish a right of recreation by immemorial user, and the evidence to establish the right must be of the same character and as strong as in the case of prescription—that is, it must shew that the right claimed has been enjoyed nec vi nec clam nec precario.

The respondent, an individual burgess of a burgh, raised an action for interdict against the appellants and other persons encroaching on a strip of ground consisting of a few yards in length and breadth, situated on the edge of a river, on the plea that the ground in question had from time immemorial been dedicated by the magistrates of the burgh to the use of the burgesses and inhabitants for the purpose of recreation and amusement, and the bleaching and drying of clothes. The magistrates, who were made parties, lodged a minute that the operations complained of were not a disadvantage to the burgh:—

Held, reversing the decision of the Lord Ordinary and the First Division of the Court of Session, Scotland, (1899) 2 F. 107; (1902) 4 F. 771, that the ground in question had not from time immemorial—that is, for a period of forty years—been dedicated or appropriated by the magistrates to the uses nor the purposes of recreation. MONTGOMERY & Co. *v.* WALLACE-JAMES - - - - H. L. (Sc.) 73

2. —— *Entail — Restriction — Provision for Widow—Deduction from Free Rental—Entail Provisions Act*, 1824 (*Aberdeen Act*), 5 *Geo.* 4, *c.* 87, *s.* 1.

By s. 1 of the 5 Geo. 4, c. 87, it was provided that the annuity to the widow of the deceased heir of entail "shall not exceed one-third part of the free yearly rent of the said lands and estates where the same shall be let, or of the free yearly value thereof where the same shall not be let, after deducting the public burdens, life-rent provisions, the yearly interest of debts and provisions, including the interest of provisions to children . . . . and the yearly amount of other burdens of what nature soever affecting and burdening the said lands and estates, or the yearly rents or proceeds thereof, and diminishing

SCOTTISH LAW—*continued.*

the clear yearly rent or value thereof to such heir of entail in possession, all as the same may happen to be at the death of the grantor":—

Held, affirming the decision of the Second Division of the Court of Session, (1902) 5 F. 48, that on the calculation of the widow's annuity the heir of entail in possession was not entitled to make deduction for upkeep of estate, buildings, and fences, or for management and superintendence of the estate, these outgoings not being, in the sense of the statute, burdens affecting either the estate or its rents. EARL OF GALLOWAY *v.* DOWAGER COUNTESS OF GALLOWAY

H. L. (Sc.) 50

3. —— *Fishings — Mussel Fishings — Crown Rights.*

Mussel scalps on the foreshore or the estuary of a navigable river form part of the patrimonial property of the Crown which it can convey or let in lease to a subject.

The decision of the First Division of the Court of Session, Scotland, (1902) 4 F. 698, affirmed. PARKER *v.* LORD ADVOCATE

H. L. (Sc.) 364

4. —— *Landlord and Tenant—Condition to take over Sheep at expiration of Lease—Forfeiture of Lease.*

A tenant in a letter offering to take a lease of a farm for ten years from 1897 stipulated that at his "awaygoing at the expiration of the lease" the landlord should take over the sheep at a valuation. The lease contained a clause that the lease should be forfeited for non-payment of rent, and, the tenant having failed to pay five half-years' rent, the landlord put an end to the lease in February, 1902, and refused to take over the sheep:—

Held, reversing the decision of the Second Division of the Court of Session, reported as *Stewart* v. *Breadalbane* (*Marquis of*), (1903) 5 F. 359, that "awaygoing" must be taken to mean the legal expiration of the lease, and that the landlord on the tenant's default was not bound to take over the sheep. MARQUESS OF BREADALBANE *v.* STEWART - - - H. L. (Sc.) 217

5. —— *Remuneration of Procurator Fiscal—Preliminary Inquiries into Non-prosecuted Cases—County General Assessment Act*, 1868 (31 & 32 *Vict. c.* 82), *s.* 3, *sub-ss.* 2, 3—*Rogue Money Act*, 1724 (11 *Geo.* 1, *c.* 26), *s.* 12.

In an action for debt, the debt must be established either by contract or at common law or by statute.

Sect. 4 of the County General Assessment Act, 1868, authorized an assessment to be imposed called the "county general assessment"; and s. 3 provided that "the following salaries, fees, outlays, and expenses, namely (sub-s. 2): The salaries or fees and necessary outlays of Procurators Fiscal in the Sheriff and Justice of Peace Courts . . . . in so far as such salaries, fees, and outlays are at present in use to be paid by each county." Sub-s. 3: "The expenses incurred in searching for, apprehending, subsisting, prosecuting, or punishing criminals:—in so far as any such salaries, fees, outlays, and expenses are not by law or usage payable or provided from other funds than those raised by the Commis-

SCOTTISH LAW—*continued.*

sioners of Supply, may be defrayed by the said Commissioners out of the 'county general assessment.'" Under the Rogue Money Act of 1724 certain fees had been paid to the Procurators Fiscal for criminal prosecutions. Subsequently those charges which lay on the county were undertaken by the Treasury, and eventually a salary in lieu of fees was paid to the Procurators Fiscal. The Procurator Fiscal of the lower ward of Lanark alleged that his salary only included cases which were reported or went to trial, and made a claim for remuneration for those cases in which he made inquiry, but which went no further. Since 1851 the county council had refused to pay this claim. And from 1851 to 1868, when the County General Assessment Act came into force, no attempt had been made by the then Procurator Fiscal to compel the county to pay, although accounts by the Procurator Fiscal were furnished at different periods:—

Held, reversing the decision of the Second Division of the Court of Session, *Hart* v. *County Council of the County of Lanark*, (1902) 40 S. L. R. 117, that it could not be said that in the county of Lanark "it was in use" to pay these fees at the date of the Act of 1868, and therefore the county was not liable. LANARK COUNTY COUNCIL *v.* HART - - **H. L. (Sc.) 235**

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STOCK EXCHANGE—*Default of Broker—Liquidation under Stock Exchange Rules—Claim by Jobber—Right of Action against Broker—Bankruptcy—Right of Stock Exchange Creditor to petition in Bankruptcy.*

When a member of the London Stock Exchange is declared a defaulter and his contracts are dealt with by the official assignee of the Stock Exchange, the proceedings in that liquidation are not an accord and satisfaction of the member's debts, and do not bar his creditors from suing him at law for the balance of their claims after deducting the dividends received by them in that liquidation.

A creditor who has obtained judgment in such an action can maintain a petition in bankruptcy against the defaulter.

The decision of the Court of Appeal, [1902] 2 K. B. 653 and [1903] 1 K. B. 216, affirmed. MENDELSSOHN *v.* RATCLIFF - H. L. (E.) 456

STREAM—Riparian owner—Railway company—Abstraction of water for purposes unconnected with riparian tenement - 301
See WATER. 1.

STREETS—*Private Street Works—Determination that Street is a Highway—Estoppel—Res Judicata—Judgment in Rem—Local Government—Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 6, 7, 8.

In proceedings taken by an urban authority under the Private Street Works Act, 1892, ss. 6, 7, 8, to compel owners of premises to do private street works in a street, the determination by a Court of summary jurisdiction that the street is a highway repairable by the inhabitants at large is a judgment in rem and conclusive as to the status of the street, and the question whether it is so repairable is res judicata in any future proceedings under these sections.

So *held* in a case arising under similar sections in the Wakefield Corporation Act, 1887.

The decision of the Court of Appeal, [1903] 1 K. B. 417, affirmed. WAKEFIELD CORPORATION *v.* COOKE - - - - H. L. (E.) 31

SUPPORT—Right of, for water pipe—Minerals under pipe - - - - 64
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SURPLUS PROFITS — Dividend, Making up deficiency of previous - - 27
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SWAMP LANDS—Crown Lands—Transfer of proprietary right—Canadian Act 799
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SWEARING — Clergy discipline — Occasional swearing and ribaldry - - 283
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See under LANDLORD AND TENANT.

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TOBAGO—Laws of - - - - 415
See PRIVY COUNCIL APPEALS. 34.

TOLLS—Power to levy—Locks—Stanch—Navigable non-tidal river - - 476
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TRADE FIXTURES—Mortgage—Hire-purchase agreement—Rights of mortgagee against owner of machinery - - 466
See FIXTURES.

TRADE-MARK—No exclusive right to the trade word of local source - - 103
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TRANSVAAL—Laws of - - - 438
See PRIVY COUNCIL APPEALS. 1.

TRESPASS—Newfoundland, Laws of—Effect of grant of licence—Trespass on licensee's land before licence granted—Damages
See PRIVY COUNCIL APPEALS. 405

TRINIDAD—Laws of - - - 415
See PRIVY COUNCIL APPEALS. 34.

TRUST—*Will—Denuding—Vesting.*

A testator directed that the income of his property (consisting of movable and real estate) be divided between his children; that in the event of any child dying leaving issue his or her share of income should be paid to the issue; and if a child left no issue the deceased child's share should be divided among the survivors; and he finally directed that "on the death of all" his children his estate should "be winded up and converted into money" . . . . and divided among the children of his sons and daughters per stirpes.

The testator was survived by four children—Andrew, who died unmarried, George, who died in 1880, survived by the appellant (who became of age in 1898), Mary, and Jane; the two latter were still alive and had families. The appellant

TRUST—*continued.*
claimed payment of one-third of the corpus of the testator's estate:—

Held, affirming the decision of the Second Division of the Court of Session, (1900) 2 F. 749, that the appellant was not entitled to immediate payment on the ground that the third of the income of the corpus was not by any means the same as the income of a severed portion of the estate; and it did not follow that if the estate was now divided that the remaining portion of the estate left undivided would represent in the future the present value.

Miller's Trustees v. *Miller*, (1890) 18 R. 301, and *Yuill's Trustees* v. *Thomson*, (1902) 4 F. 815, affirmed. MACCULLOCH *v.* ANDERSON H. L. (Sc.) 55

—— Church—Identity—Fundamental doctrine—Limits to power of union - 515
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TRUSTEE IN BANKRUPTCY.
See under BANKRUPTCY.

UNSEAWORTHINESS—Charterparty—Unseaworthiness at starting—Personal negligence of owner in lading - - 250
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USER—Immemorial use by inhabitants of ground for recreation—Encroachment - 73
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VESTING—Trust—Will—Denuding - 155
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WARRANTY—Free of capture, seizure, and detention—"Seizure"—Property of alien enemy - - - 359
See INSURANCE, MARINE.

WATER—*Railway Company—Abstraction of Water for purposes unconnected with riparian Tenement—Riparian Owner.*

The owner of a tenement adjoining a natural stream has no right to divert the water to a place outside the tenement, and there consume it for purposes unconnected with the tenement.

A natural stream was crossed by a railway line and flowed down to a mill. The railway company claimed the right to insert a pipe into the stream at the crossing (which was the only place where their land adjoined the stream), and to carry the water along their line to a distant tank, and there to consume it in working their locomotive engines along the whole of their railway. If the pipe was used to its full capacity it might not have substantially injured the mill:—

Held, that the railway company were not entitled to carry out their proposal (which was not for purposes connected with the land where it crossed the stream), and that the millowner would be justified in stopping up the proposed pipe.

The decision of the Irish Court of Appeal reversed.

Earl of Sandwich v. *Great Northern Ry. Co.*, A. C. 1904.

WATER—*continued.*
(1878) 10 Ch. D. 707, overruled. MCCARTNEY *v.* LONDONDERRY AND LOUGH SWILLY RAILWAY COMPANY - - - H. L. (I.) 301

2. —— *Support for Water Pipe, Right of—Minerals under Pipe—Edinburgh Water Act*, 1819 (59 *Geo.* 3, *c. cxvi.*)—*Edinburgh Water Company Act*, 1843 (6 & 7 *Vict. c. lxxxix.*).

By the Edinburgh Water Act of 1819 (59 Geo. 3, c. cxvi.) the Edinburgh Water Company were empowered to lay pipes for conducting water to the city.

By s. 38 the company were authorized to take and use grounds and premises for the purpose of forming reservoirs, and to make the necessary cuts for conducting water to the city, and to lay the necessary pipes for that purpose, giving one month's notice of their intention to the owners and occupiers of such grounds and premises, and making satisfaction to such owners and occupiers in manner thereinafter directed.

In 1823 a strip of ground was opened by the company and a pipe laid, part of which passed through the lands of the appellants and their predecessors. The pipe was continuously used without question down to the commencement of this action in 1898, when it was threatened with injury by the appellants working certain minerals lying under the pipe. The company having raised an action for an interdict to restrain the appellants from working the minerals adjacent to the pipe so as to injure it, it did not appear that any payment or satisfaction had been made by the company in respect of laying the pipe:—

Held, affirming the decision of the First Division of the Court of Session, (1900) 3 F. 156, that after nearly eighty years' enjoyment of the way-leave it must be presumed that whatever was necessary to obtain the right to support for the pipe had been done.

London and North Western Ry. Co. v. *Evans*, [1893] 1 Ch. 16, approved. CLIPPENS OIL COMPANY *v.* EDINBURGH AND DISTRICT WATER TRUSTEES - - - H. L. (Sc.) 64

3. —— *Waterworks Company—Surplus Profits—Dividend—Prescribed Rate—Making up Deficiency of Previous Dividend—Deficiency prior to Incorporation of General Act—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 1, 75.

A water company, one of whose special Acts incorporates the Waterworks Clauses Act, 1847, has no power to apply its surplus profits in making up to its ordinary stockholders any deficiency in the prescribed rate of dividend, or a full 10*l.* per cent. dividend (if that is the prescribed rate), for any years before the time when the Waterworks Clauses Act, 1847, was made applicable to the company.

The decision of the Court of Appeal, [1903] 1 Ch. 575, affirmed. COMPANY OF PROPRIETORS OF THE KENT WATERWORKS *v.* LAMPLOUGH H. L. (E.) 27

WATER HIGHWAY—*River—Navigable Non-tidal River—Public Right of Navigation—Power to levy Tolls—Locks—Stanch—Royal Charter, Validity—Grant of Exclusive Passage for Boats, &c.—Implied Obligation to Maintain and Repair—Dedication*—6 *Geo.* 1, *c.* 29.

Under letters patent in the seventeenth

WATER HIGHWAY—*continued.*

century the owner of land adjoining the river Ouse between St. Neots and St. Ives, which was there a public river navigable only in sections, made in his own land cuts from the river and locks in the cuts and took tolls from the vessels passing through the locks. In 1720 by 6 Geo. 1, c. 29, the then landowner was empowered to rebuild a stanch in the river below St. Ives and to repair and maintain it and to take tolls on vessels passing through it. Tolls were collected at the lock for more than 200 years and at the stanch for a long period by the predecessors in title of the appellant:—

Held, by Lords Macnaghten, James, and Robertson (Lords Davey and Lindley dissenting upon the question of a highway through the locks), that there was no evidence that the locks had ever been dedicated to the public as a highway, and that the appellant was not bound to maintain or repair or allow the public to pass through the locks or the stanch.

The decisions of Farwell J. and the Court of Appeal, [1901] 2 Ch. 671, reversed. SIMPSON *v.* ATTORNEY-GENERAL - - H. L. (E.) 476

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